U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 10 September 2004

In the Matter of
KENNETH S. DAVIS
Claimant

v.

RAYTHEON RANGE SYSTEMS ENG./
LIBERTY MUTUAL INSURANCE CO.
Employer/Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

Case Nos.: 2003 LHC 631
2003 LHC 632

OWCP Nos.: 15-44298
15-43351

Appearances: Mr. Patrick B. Streb, Attorney
For the Claimant

Mr. Kurt A. Gronau, Attorney
For the Employer

Before: Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER –
Partial Award of Medical Benefits
Partial Award of Reimbursable Incidental Expenses
Partial Award of Temporary Total Disability Compensation
Award of Permanent Partial Disability Compensation

This case involves a claim filed by Mr. Kenneth S. Davis for disability compensation and medical benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 to 950, as amended ("Act"), as extended by the Defense Base Act, 42 U.S.C. § 1651 *et seq*., for injuries that he suffered while an employee of Raytheon Range Systems ("Raytheon" and "Employer").

On November 11, 2002, through counsel, Mr. Davis filed a pre-hearing statement seeking disability compensation and medical benefits for injuries that occurred on March 11, 1998 and November 16, 1999. On December 9, 2002, the District Director forwarded the pre-hearing statement to the Office of Administrative Law Judges. Pursuant to a Notice of Hearing, dated

January 29, 2003 (ALJ I),[1] I conducted a formal hearing on May 12, 2003 in Honolulu, Hawaii, attended by Mr. Davis, Mr. Streb, and Mr. Gronau. My decision in this case is based on the hearing testimony and all the documents admitted into evidence: CX 1 to CX 27 and EX A to EX G.[2]

ISSUES[3]

1. Average weekly wage

2. Entitlement to medical benefits and incidental expenses

   A. First hernia repair

   B. Second hernia repair

   C. First left knee surgery

   D. Second left knee surgery

3. Nature and extent of disability

   A. Temporary total disability

      Hernia injury

      Left knee injury

   B. Permanent partial disability

[1]The following notations appear in this decision to identify exhibits: CX – Claimant exhibit; EX – Employer exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

[2]I kept the record open at the conclusion of the hearing to enable counsel to provide post-hearing depositions. On August 12, 2003, I received from Claimant's counsel the deposition of Dr. Robertson and now admit the document as CX 27. On August 14, 2003, I received from Employer's counsel the deposition of Dr. Kienitz and now admit that document as EX G.

[3]At the hearing, Mr. Streb raised the potential issue that Mr. Davis may also need medical treatment for his right knee. Mr. Gronau objected that no formal claim had yet been presented (TR, pages 18, and 20 to 23). In their closing arguments, neither counsel returned to this potential issue and I have not addressed it in this decision.

Parties' Positions

Claimant[4]

Mr. Davis is a photo optics technician who worked for Raytheon on Kwajalein Atoll. On March 11, 1998, Mr. Davis suffered a hernia injury which required two surgeries, September 16, 1999 and December 14, 2000, for a successful repair. Mr. Davis suffered a left knee injury on November 16, 1999 which also required two corrective surgeries.

The first issue in this case involves determination of the appropriate average weekly wage under Section 10 (c) of the Act. Because Mr. Davis worked extensive overtime and the Employer has not provided comparable wages, neither Section 10 (a) nor Section 10 (b) are applicable. For the disability compensation associated with both injuries, the Employer used an average weekly wage of $640.00, which is clearly inappropriate. In regards to the hernia injury, consideration of Mr. Davis' income for 1997 and 1998 yields an average weekly wage of $939.60. For the left knee injury, averaging Mr. Davis' 1999 income, after accounting for the days he was unable to work, produces an average weekly wage of $896.49.

Mr. Davis seeks incidental expenses in the amount of $2,500 which exceeded the subsistence payment provided by the Employer for his first hernia operation. Believing the Employer would provide its usual subsistence rate, Mr. Davis did not retain receipts of his expenses. The period of temporary total disability for the first hernia operation was September 11 to September 28, 1999.

Mr. Davis seeks reimbursement for airfare, subsistence, car rental, and his insurance co-payments ($217 doctor fee and $294 hospital bill) due to his second hernia repair. He also believes the Employer should reimburse his private health care provider, United Healthcare, for its payment of the expenses for the operations. The second surgery was required due to the ineffective nature of the first procedure. Receiving this treatment in Texas was reasonable because both his treating physician and family were located in that area. Additionally, the Employer's insurer had previously paid the expenses associated with other medical care in Texas. United Healthcare, paid the medical expenses associated with the second hernia operation. Because health care providers usually have a lifetime cap on benefits, Mr. Davis believes the Employer should be directed to reimburse United Healthcare. The period of temporary total disability compensation for the second hernia procedure ran from December 7, 2000 to January 9, 2001.

Mr. Davis claims incidental expenses associated with the follow-on treatment of his left knee injury. These expenses include the airfare and incidental expenses associated with his visit to Dr. Smith in June and July 2000. Also, he seeks temporary total disability compensation from April 4 to April 11, 2000.

[4]TR, pages 7 to 18 and closing brief, dated August 7, 2003.

The Employer approved Dr. Robertson for the second knee surgery. Mr. Davis seeks airfare and expenses related to that treatment. The temporary total disability period is December 27 to December 30, 2000.

Based on the condition of his left knee following the second surgery, Mr. Davis seeks a permanent partial disability compensation based on Dr. Robertson's finding that he has suffered a 22% impairment to his left lower extremity. Based on Dr. Robertson's recommendation, Mr. Davis seeks entitlement to future medical treatment for his left knee.

The Employer has only paid a portion of the appropriate disability compensation. Mr. Davis is entitled to the following days of temporary total disability compensation: first hernia repair, 7 days; second hernia repair, 33 days; left knee injury, 21 days.

Finally, Mr. Davis seeks payment of attorney fees. At the same time, he has waived entitlement to penalties and interest.

Employer[5]

Acknowledging the initial average weekly wage was understated, and agreeing that Section 10 (c) is applicable, the Employer believes the appropriate average weekly wages are $886.32 and $992.87 for the two respective injuries.

Since Mr. Davis took leave during a portion of the time he claims temporary total disability compensation, he is not entitled to such compensation for the entire duration. Additionally, because Mr. Davis chose a more expensive air route in order to facilitate his vacation in Las Vegas, he is not entitled to the additional expense.

Mr. Davis has failed to establish that the second hernia operation was necessary and that the procedure had to be accomplished in Texas rather than on Kwajalein Atoll.

The Employer also challenges Mr. Davis' choice of physicians for the second hernia and left knee operations.

Finally, the award of a 10% impairment rating for Mr. Davis' left knee is appropriate. Dr. Robertson's add-on of 12% is suspect and not consistent with the medical record and the latest AMA (American Medical Association) disability guidelines.

SUMMARY OF EVIDENCE

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues.

[5]TR, pages 19 to 28 and closing brief, dated August 7, 2003.

Mr. Scott A. Davis
(TR, pages 40 to 117)

[Direct examination] Mr. Davis, who is 49 years old, presently works for Kwajalein Range Systems on Kwajalein Atoll ("Kwajalein"). Previously, he was employed by Raytheon but the contract changed in March 2003. The atoll is a test site for the Department of Defense. Almost the entire population on the atoll are employees for various contractors. Mr. Davis is a senior photo optics technician who maintains high speed cameras used in recording various tests. These cameras are very heavy and usually have to be placed on towers. As a result, his job requires heavy lifting.

As a Raytheon employee, Mr. Davis worked long hours, up to 60 hours a week, six to seven days a week. He was paid hourly and his overtime was "straight time." CX 15 contains his tax records. His taxable income was the amount he earned on Kwajalein.

Mr. Davis comes from Texas and still has family in the area around Austin and San Antonio.

In early 1998, Mr. Davis was moving camera equipment and felt a twinge in his stomach. A few months later, while doing sit-ups, he noticed a lump in his navel area. When he went on vacation in March 1998, his doctor told him the lump was a small hernia. However, because it wasn't causing any pain, the physician said it only had to be fixed if it got worse. On the accident report (CX 1 and CX 16), Mr. Davis put down March 11, 1998 as the date of the accident, but that was a mistake.

At first, Mr. Davis was treated by Dr. Thornhill on the atoll. The physician prescribed a low protein diet and weight reduction to deal with the hernia. He saw a few more doctors, including the chief physician, Dr. Lindborg. Mr. Davis complained to Dr. Lindborg that no one was helping him to fix the hernia. Finally, the insurance company accepted the claim (CX 5) and Dr. Nguyen in Llano, Texas conducted the hernia repair operation on September 16, 1999 (CX 17).

In December 1999, due to problems with his medical claim, Mr. Davis filed a workers' compensation claim while in Honolulu, Hawaii (CX 8).

Later, when he was checked again, Dr. Thomas indicated another hernia was located in the same area. In October 2000, another physician on Kwajalein, Dr. Paget, indicated that he had a recurrent hernia. The doctor observed no mesh had been used in the first repair and that Mr. Davis needed mesh to effectively repair the hernia (CX 16).

The medical facility on Kwajalein is a small hospital. The medical personnel try to conduct only emergency surgeries. They send people off the island for major problems.

By e-mail (October 25, 2000), Mr. Davis informed the workers' compensation representatives about his recurrent hernia (CX 24, pages 230 and 231). At the time, he was in Texas and on his way back to Kwajalein. He was trying to get the workers' compensation

insurer to take care of his medical problem. However, the representative did not respond. When Mr. Davis arrived in Honolulu, he contacted the representative who then attempted to find a physician for the repair procedure. But, no doctor wanted to get involved with the repair of the recurrent hernia. So, Mr. Davis returned to Kwajalein.

Because his hernia was sore and he was experiencing pain, Mr. Davis contacted Dr. Nguyen in Texas and arranged another operation. He advised the workers' compensation representative about the arrangement (December 3, 2000) (CX 24, page 233). On December 14, 2000, Dr. Nguyen accomplished the second hernia repair operation.

CX 25, page 235 is the instruction employees receive when they go out for medical care under workers' compensation. Mr. Davis received this document from Ms. Donna Mayo, a representative for Raytheon. The document indicates a maximum of $120 per day for meals and hotels. Previously, Liberty Mutual ("Liberty" or "Insurer") had not required Mr. Davis to produce receipts when he traveled to receive medical treatment.

Mr. Davis has set out the expenses for his first hernia operation (CX 22). Mr. Davis paid the airfare from Honolulu to San Antonio ($700), the car rental ($36.25 x 15 days) and 17 days subsistence at $95 a day. He did not keep receipts because he did not know that was a requirement. The Insurer paid him $322. His travel order, which is required to leave and return to Kwajalein, is located at CX 22.

For the second hernia repair, Liberty did not pay any of his travel expenses. He paid the airfare and the subsistence of $95 a day for 20 days. Although his insurance company, United Healthcare paid for the medical procedure, Mr. Davis made co-payments of $217 to the Llano Memorial Hospital in October 2001 (CX 22), and $294 to Dr. Nguyen. Mr. Davis also had to take vacation days from December 7, 2000 to January 9, 2001 for the trip and procedure. He did not receive any disability compensation. CX 22 contains a copy of his travel order.

On November 16, 1999, after playing soccer, Mr. Davis experienced some soreness in his left knee which he treated with rest and Motrin. The knee didn't bother him very much until a month later after he had been lifting and squatting while moving heavy equipment. He reported this knee problem to his supervisor who instructed him to watch it. Eventually, Mr. Davis went to a doctor. After x-rays did not reveal any problem, the physician placed a splint on the knee, prescribed pain medication and sent him to physical therapy. Eventually, Mr. Davis reported the injury (CX 9). The physical therapy did not improve the condition of his knee.

Finally, Raytheon sent him to Honolulu for an evaluation by Dr. Davenport. At that time, Dr. Davenport diagnosed a meniscus tear and set a surgery appointment for a week later (CX 19). When the Raytheon representative objected to the week delay, Mr. Davis was re-referred to Dr. Smith (CX 19). Dr. Smith also diagnosed a meniscus tear and conducted an operation within a day or two, on April 6, 2000. He was then referred to physical therapy on Kwajalein. Mr. Davis saw Dr. Smith a couple times in June 2000 and November 2000.

Mr. Davis continued to experience pain in his knee. In October 2000, another physician, Dr. Elliott evaluated his knee pain (CX 16). The doctor stated Mr. Davis probably would have to undergo another knee operation and may eventually require a knee replacement.

Mr. Davis' job requires travel to other locations. In February 2001, he traveled to Wake Island. On Wake Island, Mr. Davis had to climb up and down ladders, while setting up tracking mounts. When his left knee swelled, Mr. Davis went to Dr. Corbett on the island (CX 20).

Mr. Davis then went to Honolulu and attempted to see Dr. Smith; however, he was not available. As a result, Mr. Davis saw Dr. Harpstrite (CX 19). The physician diagnosed arthritis and told Mr. Davis to either cope with the pain or get a knee replacement. Dr. Harpsprite also prescribed a medial unloader brace. Mr. Davis was fitted for the brace, but before it was finished, Liberty denied his claim for the device. Dr. Paget also recommended the brace.

Due to his difficulties with the Insurer, Mr. Davis returned to his home area in Texas and saw Dr. Robertson about December 2000. He chose the location because family members lived in the area who could take care of him during any recovery. His personal physician, Dr. Hogue, observed his swollen knee, ordered an MRI (CX 18), and referred Mr. Davis to Dr. Robertson. In April 2001, Dr. Robertson conducted a second operation on Mr. Davis' left knee (CX 18). Liberty authorized the change of physicians to Dr. Robertson and paid his medical bill. The second surgery seems to have resolved most of his knee problems. Mr. Davis still experiences some residual pain. He Davis last saw Dr. Robertson in April 2003. At that time, Dr. Robertson ordered MRIs on both knees because Mr. Davis had also started experiencing right knee pain within the last year.

Mr. Davis has received injections for his left knee problem (CX 16). His left knee has given out a few times, causing him to fall (CX 16).

Liberty paid for Mr. Davis' medical expenses associated with the April 2000 knee surgery (CX 23). However, he paid his airfare for the follow-up trip to Dr. Smith in June and July 2000. In December 2000, while on vacation in Las Vegas, Mr. Davis flew roundtrip from Las Vegas to San Antonio to see Dr. Robertson. He paid that airfare. He also paid four days of subsistence and car rental while in San Antonio. He claims three days of disability compensation.

In April 2001, Liberty paid his airfare to and from Honolulu and Mr. Davis paid for the airline ticket round trip, Honolulu to San Antonio. He incurred hotel, rental car, and subsistence expenses in Honolulu and San Antonio. He also claims temporary total disability compensation from March 24, 2001 to April 10, 2001. Mr. Davis paid for a return trip to see Dr. Robertson in June 2001, through Las Vegas. He had a one day hotel, rental car, and subsistence expense. He seeks four days of temporary total disability compensation from June 3 to June 6, 2001. He repeated the trip with associated expenses in October 2001. His claim for temporary total disability compensation runs from September 29, 2001 to October 4, 2001. Another follow-on examination occurred in July 2002 during his vacation with similar expenses. He claims disability compensation from July 29, 2002 to August 3, 2002. He followed the same routine in October 2002 with disability from October 28, 2002 to October 31, 2002.

Mr. Davis seeks reimbursement for the latest medical bills from Dr. Robertson and the costs associated with his own participation in the hearing.[6]

CX 21 contains copies of all the checks Mr. Davis has received from Liberty.

[Cross-examination] After he injured his left knee, Mr. Davis stopped playing soccer. Since the knee injury, Mr. Davis walks, swims a little, and rides a bicycle.

Mr. Davis only had to pay three items which were not covered by his private health insurance: the hospital bill, a physician's bill, and $40 to Dr. Robertson. Mr. Davis has received no correspondence from United Healthcare seeking reimbursement of the bills it paid on his behalf.

Mr. Davis went to see Dr. Robertson because he was "displeased with the services" provided by the Honolulu doctors. Neither Dr. Davenport nor Dr. Smith seemed to have accomplished thorough examinations of his knee prior to prescribing an operation. When he asked Dr. Smith whether he would do an MRI, the physician replied that he knew it was a meniscus problem. The problem turned out to be a torn meniscus.

Prior to seeing Dr. Robertson while on vacation, Mr. Davis did not ask Liberty if he could see the physician. When his personal physician saw the swollen knee, he suggested both the MRI and referral to Dr. Robertson, who was an orthopedic surgeon.

Raytheon did not inform Mr. Davis that the $120 a day expense limit would apply no matter where he traveled. Mr. Davis didn't know that he needed to keep receipts. According to Mr. Davis, employees are not given any guidance on how to do things. They're told it will be taken care of. Mr. Davis did not receive any specific information from either Raytheon or Liberty that he would not need receipts.

When Mr. Davis goes on a trip to one of the other locations, the daily expenses are computed before he leaves and he receives an expense check. Mr. Davis is responsible for any expenses that exceed the advance payment.

Mr. Davis agreed that an airline trip segmented with a stop in an intermediate city might be more expensive than a direct flight. For example, a ticket covering a trip from Honolulu to Las Vegas to San Antonio would be more expensive than a ticket from Honolulu direct to San Antonio.

Following a knee operation, Mr. Davis needed help with daily living activities. Since Liberty would not provide such help, he went to Texas to get that type of support from his family.

[6]Since counsel did not specifically raise Mr. Davis' personal expenses during litigation as a claim, I have not addressed this issue. Mr. Davis did not provide evidence concerning the amount of such expenses and generally the incidental expenses associated with an employee attending a hearing are not recoverable. *See Castagna v. Sears, Roebuck & Co.*, 4 BRBS 559 (1976), *aff'd. mem.,* 589 F.2d 1115 (D.C. Cir. 1978).

[ALJ examination] Liberty paid for the first hernia operation that was conducted in Llano, Texas.

CX 15, page 38 shows Mr. Davis received straight time and over-time pay. In 1997 to 1999, he usually averaged about 20 hours of overtime for a two week pay period. The pay category "A" reflects additional per diem he received when working at other locations.

Dr. Smith asked Mr. Davis to return several times for follow-up evaluations of his knee. Mr. Davis described his continued problems and the physicians tried different medications. Liberty paid for the initial trip for knee surgery. When Mr. Davis returned for a follow-up visit, he did not claim airfare for that trip because "you can't get anything out of Liberty Mutual." Trying to get things paid involved a constant fight with Liberty.

Accident Report/First Report of Injury/Claim
(CX 1, CX 2, CX 8, CX 16, and EX A)

On August 15, 1998, Mr. Davis filed an accident report, stating that on March 11, 1998, while moving some heavy cameras, he felt a sensation in his navel area. He didn't think much about it until doing sit-ups when he noticed a lump in the area. While on vacation in March 1998, Mr. Davis saw a doctor who told him the lump was a small hernia. The doctor suggested a repair if it worsened. At the present time, the hernia was not causing him any pain. On December 12, 1998, the Employer filed a First Report of Injury indicating Mr. Davis felt a sensation in his navel while moving heavy cameras. Later, Mr. Davis filed a compensation claim. He claimed a bi-weekly income of $1,427.00 and yearly income of $53,000.

Claim Controversions
(CX 3, CX 13, and EX B)

On January 21, 1999, the Employer controverted Mr. Davis' right to disability compensation for a March 11, 1998 hernia due to the Claimant's late report and causation. The Employer first became aware of the problem in August 1998.

On October 19, 2001, the Employer controverted Mr. Davis' claim to a 22% permanent partial impairment rating for his left knee.

Mr. Robert K. Carson
(CX 4)

In May 1999, Mr. Carson, the optics supervisor, stated that Mr. Davis first reported his injury on August 14, 1998. He described hurting himself on March 11, 1998, moving a heavy camera. Mr. Carson vouched for Mr. Davis' veracity.

Liberty Correspondence/Disability Compensation
(CX 5 and CX 6)

On May 18, 1999, Liberty accepted liability for Mr. Davis' March 11, 1998 condition. Between September 19, 1999 and September 27, 1999, the Employer paid Mr. Davis temporary total disability compensation at the weekly rate of $426.67, based on an average weekly wage of $640.00.

Mr. Davis' Correspondence
(CX 7)

On November 25, 1999, Mr. Davis sent a letter to Ms. Marina Diaz of Liberty complaining about the behavior of a new workers' compensation representative who appeared to question the severity of Mr. Davis' hernia. In particular, Mr. Davis observed that his treating physician had imposed a lifting limit of 50 pounds in an effort to prevent a recurrence. He expressed his desire to return to work with the lifting restriction.

Notice of Injury and First Report of Injury
(CX 9, CX 10, CX 16, and EX A)

On February 15, 2000, Mr. Davis reported that on November 16, 1999, he had to come out of a soccer game because of a sore left knee. After taking some Motrin, he did not experience any pain until a month later when he was doing a lot of up and down motion during work. Then, in the week prior to filing the report, the pain had become worse.

On February 17, 2000, the Employer filed a First Report of Injury concerning left knee pain. Mr. Davis claimed to have injured his left knee playing soccer on November 16, 1999. He treated the pain with Motrin and did not see a physician until February 10, 2000. The Employer did not authorize medical treatment.

Disability Compensation
(CX 11, CX 12, CX 14, CX 21, EX C, and EX F)

Between September 19, 1999 and September 27, 1999, the Employer paid Mr. Davis temporary total disability in the amount of $548.57, at the compensation rate of $426.67, based on an average weekly wage of $640.00. A physician returned Mr. Davis to work on September 28, 1999. The compensation related to the March 11, 1998 injury.

For a waiting period of April 4 to April 6, 2000 associated with an injury Mr. Davis suffered on November 16, 1999, the Employer paid Mr. Davis $182.85 in temporary total disability compensation at the weekly compensation rate of $426.67, which was based on an average weekly wage of $640.00. Between April 7, 2000 and April 11, 2000, for the same injury, the Employer paid Mr. Davis $304.76 in temporary total disability compensation based on an average weekly wage of $640.00 and a weekly compensation rate of $426.67. On April 12, 2000, Mr. Davis was released to light duty which the Employer was able to accommodate.

For the same injury, the Employer also paid temporary total disability of $121.91 for July 25 and 26, 2000 at the same rate. Mr. Davis returned to work on July 27, 2000.

On June 19, 2001, the Employer additionally reported that Mr. Davis was disabled from March 24, 2001 to April 10, 2001, June 5, 2001, and June 12 to June 13, 2001. From March 24, 2001 to April 6, 2001, Mr. Davis received a total of $853.34, at the weekly compensation rate of $426.67. At the same weekly rate, from April 7, 2001 to April 11, 2001, he received $243.81. For June 5, June 12, and June 13, 2001, the Employer paid a total of $182.85 in temporary total disability compensation at the weekly compensation rate of $426.67.

In a report filed on May 9, 2002,[7] the Employer indicated the payment of $12,288.10 for a 10% permanent partial disability, related to the injury of November 11, 1999. The Employer used a weekly compensation rate of $426.67, based on an average weekly wage of $640.00. The number of weeks paid was 25.8.

Medical Treatment Reports
(EX D)

On October 6, 1999, the Employer indicated Mr. Davis received medical treatment from Dr. Nguyen for an injury that occurred on March 11, 1998. Dr. Nguyen was Mr. Davis' choice of physician. The associated period of disability was September 16, 1999 to September 27, 1999. He returned to work on September 27, 1999.

For an injury that occurred on November 16, 1999, Mr. Davis was treated by Dr. Smith who was not his choice of physician. The initial period of disability was April 4 to April 11, 2000. Mr. Davis returned to work on April 12, 2000. An additional period of disability occurred on July 25 and 26, 2000, associated with treatment by Dr. Smith. Mr. Davis returned to work on July 27, 2000.

Additionally, for the November 16, 1999 injury, Dr. Robertson treated Mr. Davis from March 24, 2001 to April 10, 2001. Mr. Davis returned to work on April 11, 2001. Dr. Robertson was Mr. Davis' physician of choice. Mr. Davis also had two additional periods of disability associated with Dr. Robertson. On June 5, 2001, he was disabled from work, but returned to work the next day, June 6, 2001. On June 12 and 13, 2001, Mr. Davis was disabled. He went back to work on June 14, 2001.

Federal Income Tax Returns and December 2001 Pay Stub
(CX 15)

For 1996, Mr. Davis reported on his federal income tax return wages and salaries totaling $29,303. At that time his place of employment was Roi-Namur, Marshall Islands.

Mr. Davis' reported income in 1997 was $46,089. He listed his duty station as Kwajalein, Marshall Islands.

[7]The copy in EX F contains only the first page of an apparent two page report. The second page is referenced as containing additional payments of temporary total disability compensation beyond April 10, 2001.

The reported income for 1998 was $51,629. His duty station remained the same.

In 1999, Mr. Davis indicated he earned $44,441 while working at Kwajalein.

For 2000, his earned income was $53,685. He worked as a senior optical technician on Kwajalein.

A Raytheon pay summary for the two week period, December 7, 2001 to December 20, 2001, listed 80 hours of "straight" time and 36.50 hours of overtime. His biweekly base rate was $1,472.16. His total gross pay year-to-date was $53,879, which included "othr pay A" and "ben credit" in addition to his straight pay and overtime pay.

Kwajalein Medical Records
(CX 16)

Dr. Earl H. Thornhill

On August 14, 1998, Mr. Davis presented to Dr. Thornhill with a small umbilical hernia. Mr. Davis described moving a heavy camera on March 11, 1998. He later noticed a small lump in his navel area while doing sit-ups. Mr. Davis did not experience any pain. The physician indicated the defect was subject to elective surgery. At present, the condition was "ok."

(On March 25, 2000, Dr. Thornhill, on Dr. Lindborg's behalf, indicated Mr. Davis needed five days of medical leave for a referral concerning a November 16, 1999 injury. On April 12, 2000, Dr. Thornhill revised the total medical leave days to eight. *See* CX 23.)

On March 10, 2001, Dr. Thornhill refilled Mr. Davis' pain medication prescription. Mr. Davis continued to have left knee pain and distress. A week later, another physician also prescribed anti-inflammatory drugs.

On October 19, 2001, six months had passed since Mr. Davis' second surgery on his left knee. Range of motion was good; however, Mr. Davis was still limping and having trouble sleeping due to pain. Dr. Thornhill diagnosed residual left knee complaints, prescribed medication, and restricted Mr. Davis' bending and squatting.

Dr. C. Eric Lindborg

On December 5, 1998, Mr. Davis returned to the Kwajalein hospital and indicated to Dr. Lindborg that he was experiencing occasional umbilical discomfort. He requested documentation to authorize a sick day to see a personal physician in Texas during an upcoming trip to Texas. Dr. Lindborg found a 1 to 2 cm umbilical hernia; he also observed Mr. Davis was overweight.

Mr. Davis returned on March 26, 1999. At that time, he was angry with the denial of eligibility by workers' compensation. He requested Dr. Lindborg's assistance. He did not like Dr. Thornhill's advice to go on a low protein diet. Mr. Davis intended to have a Texas physician

repair the hernia. He was experiencing mild soreness and intermittent protrusion. Dr. Lindborg diagnosed umbilical hernia and prepared a letter indicating Mr. Davis had an umbilical hernia that was easily correctable by surgery.

(On August 8, 1999, because sufficient medical intervention was not available on Kwajalein, Dr. Lindborg indicated Mr. Davis needed nine days of travel for a medical referral concerning a non-emergency, work-related medical condition. *See* CX 22.)

(On June 28, 2000, Dr Lindborg requested three days of medical leave, in conjunction with vacation travel, for Mr. Davis to attend an appointment on July 24, 2000.[8] *See* CX 23.)

On February 2, 2001, Dr. Lindborg conducted a follow-up examination of Mr. Davis' left knee. A previous MRI had disclosed a medial meniscus injury and degenerative changes. Mr. Davis' personal physician recommended either injections or another operation. Mr. Davis had an injection on December 28, 2000 and was feeling better. Dr. Lindborg found normal range of motion and gait. He concluded Mr. Davis' knee was stable.

Additional Physician Notes[9]

On September 28, 1999, Mr. Davis was examined after his hernia operation that was conducted on September 16, 1999. The physician observed a first degree repair, without mesh. The incision was healing well. The doctor noted a no lifting restriction of greater than 10 pounds for six weeks.

On October 28, 1999, a doctor observed the surgery wound was well healed and stated, "firm solid repair." He returned Mr. Davis to work with a 50 pound weight lifting restriction.

On February 10, 2000, Mr. Davis presented with left knee pain. The left inner part of his knee had been hurting about a week; he denied any injury; however, he has experienced soreness since November 1999. Motrin wasn't helping and he was having trouble sleeping at night. The physician did not notice any gross defect; range of motion was within normal limits. The medial aspect of the left knee was tender. The doctor diagnosed left knee pain and prescribed medication and a knee immobilizer. If symptoms persisted, the physician suggested a radiographic study would be warranted.

Dr. Edward T. Paget

On October 11, 2000, Mr. Davis presented to Dr. Paget with a persistent cold and chronic cough that did not respond to over-the-counter medication. Dr. Paget diagnosed possible bronchitis. In response to Mr. Davis' complaint of continuing left knee pain, the doctor recommended an orthopedic consult, In his treatment notes, Dr. Paget also observed, "recurrence of umbilical hernia – non-mesh repair."

[8]This appointment was Mr. Davis' second follow-up appointment with Dr. Smith in Honolulu. *See* CX 19.

[9]Signatures are illegible.

On February 16, 2000, Mr. Davis had a follow-up examination and reported his left knee locks up and feels like it will give way. The knee brace helped. Dr. Paget did not notice much swelling and an x-ray was normal. The physician ordered some physical therapy.

On February 29, 2000, a physical therapist evaluated Mr. Davis' left knee. While the range of motion was normal, some quad muscle atrophy was noted due to his three week use of the knee brace. Extreme tenderness was evident over the left MCL (medial collateral ligament).[10] The diagnosis was left knee injury with possible meniscus and MCL involvement. In addition to a course of physical therapy, the specialist recommended home exercises and continued use of the knee brace. If the knee did not respond to therapy, then an off-island referral was appropriate.

By March 18, 2000, Mr. Davis reported no improvement in his left knee. On March 22, 2000, he reported pain standing up. Dr. Paget's examination was unchanged so he recommended a transfer to Honolulu.

Following a medial meniscectomy operation to his left knee in Honolulu on April 6, 2000, Mr. Davis received physical therapy treatments from April 11, 2000 through June 14, 2000. During the course of the treatment, his knee was hypersensitive. A May 10, 2000 evaluation found reduced pain, continued tenderness and the absence of swelling.

In an October 18, 2000 follow-up session with the physical therapist, Mr. Davis reported continued medial pain in the left knee, especially on flexion. He was not experiencing any locking up. Another physical therapy session was conducted October 21, 2000 and he was feeling better.

On March 3, 2001, Mr. Davis returned to Dr. Paget with left knee pain complaints after climbing ladders and stairs at Wake Island. He was wearing the immobilizer brace at night. An unloader brace had been ordered but workers' compensation had not approved the device. Mr. Davis wanted to return to Texas for additional treatment.

On March 20, 2001, Dr. Paget wrote a letter to Dr. Robertson in Fredericksburg, Texas indicating that Mr. Davis was seeking an evaluation from Dr. Robertson. Dr. Padget described Mr. Davis' left knee aggravation due to occupational demands in February 2001. Neither physical therapy nor anti-inflammatory medication resolved his continued left knee pain. Mr. Davis had tenderness along the medial joint line and medial collateral ligament. Due to the extensive travel distances, Dr. Paget requested a prompt and complete evaluation and management with follow-on evaluations conducted by physicians at Kwajalein.

On April 12, 2001, Mr. Davis returned to physical therapy for rehabilitation after a second left medial meniscectomy was accomplished on April 3, 2001 by Dr. Robertson in Texas. Mr. Davis was using crutches and had moderate swelling over the left knee. He was placed on limited duty. On June 7, 2001, the physical therapist indicated Mr. Davis had made good progress with range of motion and strength. At that time, he had returned to Texas for follow-up and "ortho."

[10] *See* Dr. Paget's March 20, 2001 letter to Dr. Robertson.

In mid-July 2001 Mr. Davis reported continued left knee pain at night. He was unable to sleep due to the pain. Dr. Paget prescribed some medication and indicated Mr. Davis would require a follow-up appointment in Texas in December.

While in Texas on December 2, 2001, Mr. Davis received another injection. On December 20, 2001, Mr. Davis reported that on Roi his left knee gave out and he fell down three stairs. This condition had occurred a couple of times. Dr. Paget recommended a brace and orthopedic evaluation.

Dr. Andrew J. Elliott

On October 25, 2000, Dr. Elliott examined Mr. Davis' left knee. Although physical therapy had greatly reduced his left knee pain and the surgery resolved the mechanical difficulties, Mr. Davis reported continued pain over the anteriomedial portion of his left knee. On examination, the physician found full range of motion without discomfort. The mediolateral ligaments were stable. Dr. Elliott diagnosed "scar tissue revolving around the medial portal" and prescribed continued mobilization and possible steroid injections. If the mechanical problems returned, the physician suggested another arthroscopy might be necessary. Mr. Davis' physical therapy continued until November 2000. Due to apparent work scheduling difficulties, Mr. Davis did not return to or contact the physical therapy department for another month and a half. Assuming Mr. Davis was feeling better, the physical therapist discharged him on December 19, 2000.

Dr. Jillian Horner

In March 2003, Dr. Horner informed Dr. Robertson that between February 21, 2003 and March 5, 2003, Mr. Davis had received three Synvisc injections in his left knee. He had to inject the Synvisc laterally because the left knee "medial joint line was narrowed and not amendable to Synvisc insertion."

Dr. John Hogue – Medical Records
(CX 17)

On March 27, 1998, Mr. Davis presented with a notable lump near his navel. He did not have any pain complaints. Dr. Hogue discovered a non-tender umbilical hernia without any other complications. The physician indicated surgical repair may be necessary if problems developed.

On December 30, 1998, Mr. Davis, who was very active with soccer, stated he was feeling discomfort around the hernia. He had previously been advised to lose weight. Dr. Hogue recommended Mr. Davis have his hernia repaired and lose weight.

Dr. Lan T. Nguyen – Medical Records
(CX 17 and CX 18)

In June 1999, Mr. Davis saw Dr. Nguyen concerning a hernia repair. He informed Dr. Nguyen that while moving large cameras in March 1998, he felt a strain and pull in his abdominal area. Dr. Nguyen diagnosed an umbilical hernia and scheduled surgery for September 16, 1999 in Llano, Texas.

On September 28, 1999, Dr. Nguyen returned Mr. Davis to light duty work for a month. After October 28, 1999, the physician limited Mr. Davis to lifting no more than 50 to 75 pounds. In an October 1999 note, Dr. Nguyen indicated that while Mr. Davis only had to avoid heavy lifting for six weeks after his surgery, a risk of recurrence existed with any heavy lifting.

On December 14, 2000, Mr. Davis was discharged to "home" from the Llano hospital. His physical activity restriction included no heavy lifting for six weeks.

Dr. Sydney G. Smith – Medical Records
(CX 19)

On April 4, 2000, Dr. Smith examined Mr. Davis for left knee pain that started during a soccer game in November 1999. The range of motion, stability, and February 2000 x-rays were normal. However, trace effusion was present and Mr. Davis reported medial joint pain upon rotation. Dr. Smith diagnosed a high probability of a meniscus tear and recommended arthroscopic surgery. While Mr. Davis was staying at a hotel on Waikiki, a representative for Liberty was contacted and approved the procedure.

On April 6, 2000, Dr. Smith operated on Mr. Davis' left knee. The physician observed a degenerative meniscal tear with a horizontal cleavage in the posterior horn and one area of grade 2-3 chondromalacia[11] near the medial femoral condoyle. Dr. Smith incised the medial tear "back to a stable rim." Due to Mr. Davis' tight knee, complete visualization of the posterior horn was difficult. The physician also completed a chondroplasty, removed loose flaps of cartilage, and smoothed the remaining surface.

One day after surgery, Mr. Davis was sore but able to walk with one crutch. His knee was not swollen. Dr. Smith prescribed heavy physical therapy upon Mr. Davis' return to Kwajalein. In particular, he wanted Mr. Davis' quads strengthened since they had atrophied since the injury. Dr. Smith told Mr. Davis "there may be a limitation in his ultimate prognosis secondary to the chondral defect in the medial femoral condoyle." Mr. Davis planned a return to Oahu in June 2000 for a follow-up examination.

On June 22, 2000, Dr. Smith evaluated Mr. Davis' progress. Mr. Davis had increased his activities and began climbing more stairs. He reported pain in the anterior aspect of his left knee and was concerned by a recent flare-up. Dr. Smith recommended continued exercises and muscle strengthening.

[11]The loss of the protective coating over the bone. *See* Dr. Robertson's deposition.

On July 24, 2000, Mr. Davis reported that he was doing well. He had no swelling and only occasional catching. Upon examination, mild medial tenderness was noted. Dr. Smith prescribed continued exercises.

On November 17, 2000, Mr. Davis reported continued problems with his left knee, due mainly to medial aspect soreness and burning pain. He used a bicycle mainly for transportation on Kwajalein. Dr. Smith could not reproduce the symptoms on examination other than mild tenderness. Mr. Davis was concerned about nerve damage in his knee but Dr. Smith believed the pain was secondary to atrophied quads.

Dr. Paul B. Corbett – Medical Records
(CX 20)

On February 15, 2001, while Mr. Davis was working on Wake Island, he saw Dr. Corbett due to a left knee dysfunction. He had been climbing stairs frequently as part of his job which cause increased left knee pain. The physician noted medial joint line tenderness and diagnosed probable degenerative arthritis aggravated by occupational physical demands. He recommended quad strengthening and prescribed medication.

Dr. Jeffrey K. Harpstrite – Medical Records
(CX 19)

On February 26, 2001, Dr. Harpstrite evaluated Mr. Davis' continued left knee situation. He noted the prior surgery and its finding of significant degenerative joint disease. An injection in December 2000 had provided one month of relief. A recent MRI in Texas showed joint effusion, medial compartment irregularity and degeneration. Mr. Davis' left knee was swollen and he was tender on the medial joint line. Dr. Harpstrite diagnosed medial joint degenerative joint disease. The physician did not believe additional surgery was a good idea because the MRI changes appeared to be related to his prior surgery. Instead, the physician prescribed medication and a "medial unloader brace." On the same day, Mr. Davis was custom fitted for the brace. The estimate cost was just over $2,600.

Dr. Daniel B. Robertson

Medical Records
(CX 18)

On December 29, 2000, Mr. Davis presented with a left knee injury that had occurred more than a year earlier while playing soccer. In Honolulu, Mr. Davis underwent arthroscopic surgery on April 6, 2000. The surgeon noted a torn medial meniscus and chondromalacia. Since the procedure, Mr. Davis had continued to experience significant left knee pain. Upon examination, Dr. Robertson found slight swelling and pain, aggravated by both pressure and flexion. An MRI showed a medial meniscus tear and post-surgical changes. Film from the earlier operation indicated a "degenerative type tear of the medial meniscus." Dr. Robertson diagnosed a possible further tear of the medial meniscus. Because Mr. Davis had to make an

overseas trip, the physician recommended conservative treatment of an injection and anti-inflammatory medication. Mr. Davis would return in a few months for a follow-up examination.

The December 11, 2000 MRI of the left knee specifically indicated the presence of early degenerative arthritis and a "deformed medial meniscus consistent with extensive tear and deformity."

When Mr. Davis returned on March 28, 2001, he continued to have significant left knee pain, which seemed to be increasing. Dr. Robertson found trace effusion and pain along the medial joint line aggravated by pressure, flexion and rotation. The range of motion was limited. Because Mr. Davis' symptoms appeared to be increasing, Dr. Robertson recommended further arthroscopic treatment. On March 29, 2001, a Liberty representative approved the procedure. The surgery was scheduled for April 3, 2001.

During the April 3, 2001 operation, Dr. Robertson found a degenerative type tear involving the entire medial meniscus, which was a combination of a "horizontal cleavage type tear and a flap tear." A partial medial and lateral meniscectomy and debridement of extensive chondronmalacia of the medial compartment were performed. The post-operative diagnosis included "degenerative type tear of the right medial meniscus, post partial medial meniscectomy. Three days after the operation, Mr. Davis was progressing well and returning to his home in the Marshall Islands after April 8, 2001. Dr. Robertson prescribed physical therapy three times a week for six weeks. On April 23, 2001, Dr. Robertson confirmed with a Liberty representative that he wanted to see Mr. Davis in June 2001 for a follow-up examination because the physician liked "to follow my patients after surgery to check the progress and work status." His final diagnosis was meniscus tear and chondromalacia.

On June 4, 2001, Mr. Davis returned for a follow-up exam. Overall, his left knee was improved but he still had soreness. The knee was still slightly swollen and sensitive about the anterior medial arthroscopic portal. Dr. Robertson advised continuation of physical therapy and another follow-up examination in three to six months.

On October 3, 2001, Dr. Robertson again examined Mr. Davis who reported improvement. After prolonged standing and sitting, he experienced some residual soreness and swelling. Dr. Robertson concluded Mr. Davis had reached maximum medical improvement. Based on AMA guidelines, Dr. Robertson concluded Mr. Davis had a 22% impairment of his lower extremity and 9% whole person.

Mr. Davis returned to Dr. Robertson on July 31, 2002 with continued left knee problems. He also reported some developing right knee pain. After examination, Dr. Robertson diagnosed degenerative changes in the left knee, post status two knee surgeries. He believed the right knee might have a meniscus tear. Dr. Robertson recommended a change in medication and increased exercising to strengthen his legs.

In an October 2002 letter to Mr. Davis' counsel, Dr. Robertson explained his whole person disability rating due to the left knee. His determination was based on the sub-total medial meniscectomy at 3% and the lateral meniscectomy for 1%. Additionally, he added 5% due to

"advanced arthritic changes." Because Mr. Davis has been favoring his left knee, he may have placed additional stress on the right knee. Dr. Robertson believed Mr. Davis would continue to require future medical treatment for his left knee in terms of medication, injections, and a possible arthroplasty.

On October 30, 2002, Mr. Davis was again examined. The new medication seem to improve his condition, but he still had left knee soreness. Upon examination, both knees were swollen. Dr. Robertson continued the new medication and recommended a series of injections.

When Dr. Robertson saw Mr. Davis again on April 28, 2003, he had completed his series of injections. He noted some improvement but continued to have quite a bit of pain. Both walking and standing bothered his knees. His condition worsened as the day proceeded. The left knee had some slight swelling. Dr. Robertson diagnosed osteoarthritis and believed Mr. Davis was exacerbating the pre-existing arthritis in his right knee by favoring the left knee. Dr. Robertson recommended an MRI and possible surgery. Liberty approved the MRI.

A May 1, 2003 MRI of the left knee showed atrophy of the medial meniscus, most likely due to surgery, a tear of the anterior cruciate ligament and questionable residual disc material. An MRI of the right knee showed a chronic medial meniscus tear and chondromalacia.

Deposition
(CX 27)

On June 2, 2003, Dr. Robertson, a board certified orthopedic surgeon, was deposed concerning the condition of Mr. Davis' left knee. Probably through a referral from Dr. Hogue, Dr. Robertson first evaluated Mr. Davis in December 2000. As part of that evaluation, he reviewed an MRI ordered by Dr. Hogue and the other medical records sent by the insurance company. He believes the insurance company authorized his evaluation. As set out in the treatment notes, Mr. Davis had injured his knee playing soccer and underwent arthroscopic surgery in April 2000 for a torn medial meniscus and chondromalacia. However, Mr. Davis' left knee problem had not improved.

Upon examination, Dr. Robertson found slight swelling and some pain along the medial joint line aggravated by pressure, flexion, and rotation. Standing x-rays showed slight degenerative changes medially. The MRI also showed a medial meniscus abnormality as either a further tear or possible post-surgical changes. The photos from the April 2000 procedure showed a degenerative-type tear of the medial meniscus and chondromalacia of the medical and patellofemoral compartments. Chondromalacia is the loss of the smooth protective covering, articular cartilage, on the surface of the bone. Dr. Robertson diagnosed additional meniscus damage and chondromalacia. He prescribed an injection and some medication.

Mr. Davis returned in March 2001. The visit was approved by Ms. Diaz of the insurance company. He believes all the visits were approved by the insurer. Mr. Davis reported that the injection had provided relief for a while but he continued to have significant pain. The examination disclosed pain and limited range of motion. Of the several possible options, Mr. Davis elected surgery.

On April 3, 2001, Dr. Robertson operated on Mr. Davis' left knee. The physician observed a "degenerative-type" tear on the left (not "right" as stated in the surgical report) medial meniscus and changes consistent with the previous partial meniscectomy. He also found a left radial tear of the lateral meniscus, severe chondromalacia of the medial femoral condyle, chondromalacia of pattellofemoral surface, and loose, floating pieces of cartilage. A degenerative tear is usually caused by wear and tear; whereas the smaller radial tear is usually associated with a traumatic origin. The degenerative tear was in the same location as the first surgery. Dr. Robertson noted that once a meniscus is torn, it's never quite as strong or healthy and prone to further damage. The doctor found no damage to the ligaments.

As corrective action, Dr. Robertson removed more of the medial meniscus and a portion of the lateral meniscus. He smoothed the area of chondromalacia and removed the floating debris. Very little of the medial meniscus was left. The procedure is called a "subtotal meniscectomy."

Since Mr. Davis was stationed so far away in Kwajalein, Dr. Robertson agreed the physicians on the island could manage most of Mr. Davis' recovery. In April 2001, Ms. Diaz asked if a return trip in June 2001 was medically necessary. Dr. Robertson indicated that he liked to follow-up with his patients periodically. He does not recall the insurer disapproving the follow-up evaluation.

On June 4, 2001, Dr. Robertson evaluated Mr. Davis' left knee which had improved but remained slightly swollen and sensitive. The doctor recommended continued physical therapy and exercises.

After an October 3, 2001 evaluation, Dr. Robertson determined Mr. Davis had achieved maximum medical improvement. He rated the whole person impairment at 9 % which represents a lower extremity disability of 22%. Mr. Davis reported residual soreness and occasional swelling of his knee after prolonged standing or walking. In reaching his impairment rating, Dr. Robertson used the Fourth Edition of the AMA guidelines, which is used in Texas. He equated the subtotal meniscectomy to a total meniscectomy for a three percent whole person rating. The lateral meniscus meniscectomy added another percent. Additionally, based on the standing x-rays of the knees showing a three millimeter gap in the knees, he extrapolated some figures and found another five percent whole person impairment based on the knee arthritis, for a total of nine percent.

In July 2002, Mr. Davis reported improvement in his left knee but he still had problems. In particular, bending, squatting, and climbing stairs, ladders and hills were problematic. He also noted some developing problems in his right knee which the physician attributed to over-compensation for the left knee. Upon examination, Dr. Robertson noted crepitans or snapping, in both knees. His diagnosis for the left knee remained the same. He believed the right knee might also have an underlying meniscus tear that was aggravated by his left knee problem. Dr. Robertson prescribed new medication and injections. He also recommended continued exercises and muscle strengthening.

Mr. Davis returned on October 30, 2002 with soreness in both knees. Dr. Robertson recommended continued medication and injections.

Upon the next visit of April 28, 2003, Mr. Davis had completed his injections. While he noticed some improvement, Mr. Davis continued to experience pain. His pain was exacerbated by walking and standing activities. The physical examination and knee x-rays were unchanged. A recent MRI showed continued degenerative changes in the left knee. Part of the changes represented either further tearing of the meniscus or post-surgical changes. Additionally, he noted a tear of the anterior cruciate ligament. Dr. Robertson opined Mr. Davis would continue to suffer symptoms consistent with degenerative changes in both knees. He may need further medical treatment including a correction for his bowleg condition and compartmental knee replacement. In other words, the left knee will probably require a reconstructive surgical procedure. Dr. Robertson also suggests the use of an unloader brace, which is the type of brace, Dr. Harpstrite recommended in February 2001.[12] Prior to this latest visit, Mr. Davis had fallen down some stairs when his left knee gave way in December 2002. That fall could have caused the tear in the ligament. The right knee MRI showed a tear in the medial meniscus. Mr. Davis will probably need arthroscopic surgery on the right knee too.

Dr. Robertson acknowledged that the h Edition of the AMA has been published. Typically, Dr. Robertson only provides disability ratings for his patients. In the past, he had conducted independent medical evaluation ratings.

When Mr. Davis first presented in December 2000, he already had some arthritic changes in his knees which probably pre-existed his knee injury. Although the lower extremity can be rated, Dr. Robertson prefers the whole person impairment rating. Dr. Robertson based his impairment rating for the arthritic condition on the x-rays of the knees, which were in a slightly different orientation than used in the AMA impairment rating guidelines but still showed spacing of only about three millimeters. Dr. Robertson explained that though his procedure was technically termed a subtotal meniscectomy, he believed the most accurate description of the meniscus removal procedure in the second surgery was "total." As a result, he used that impairment rating.

The arthritic condition of the right knee also probably pre-existed the soccer injury to the left knee.

Dr. Robertson briefly reviewed Dr. Kienitz's December 19, 2001 report. That doctor seemed to believe Dr. Robertson was using range of motion factor in reaching his conclusion. However, Dr. Robertson denied using that consideration, which is in the Fifth Edition but not the Fourth Edition of the AMA guidelines.

Although Mr. Davis' bow-legged condition can cause a higher rate of arthritis, an injury to either knee, coupled with over-compensation, can accelerate the rate of arthritic change. In other words, Mr. Davis' injury exacerbated that underlying condition. More likely than not, the injury to the left knee has aggravated and accelerated the condition of the right knee.

[12]In his questioning, Mr. Streb indicated that the unloader brace had "finally" been approved and Mr. Davis was waiting to pick it up.

Dr. Ronald H. Kienitz

Medical Report
(EX E)

On December 19, 2001, Dr. Kienitz reviewed Mr. Davis' medical record, including Dr. Robertson's 22% permanent partial disability rating for his left knee. Dr. Kienitz also examined Mr. Davis and first noted that his gait was reasonably symmetrical. Range of motion of left knee was somewhat limited. Palpation of the medial and lateral joint lines produced pain. The knee x-rays show good joint spacing up to 5 millimeters, which did not meet the AMA criteria for arthritis. Dr. Kienitz found Mr. Davis had suffered recurrent and new medial tears, a new lateral meniscus tear, and chondromalacia. He had partially recovered from the surgeries, with a residual range of motion deficit and discomfort secondary to chondromalacia. These conditions are likely complicated by his weight and deconditioning. The prognosis included continued discomfort due to worsening of the chondromalacia.

Because of the minimal nature of the initial injury and the absence of any reported twisting or "trauma maneuver," Dr. Kienitz stated, "it is impossible to attribute all of his current knee conditions and complaints to that injury." Most likely, Mr. Davis had a pre-existing degenerative condition. The game incident caused a flare-up which brought attention to his knee condition. Dr. Kienitz noted that the only observed problem in the first surgery was the partial medial meniscus tear and some chondromalacia; his lateral meniscus and patella cartilage were normal. However, continued problems developed including a repeat tear of the medial meniscus, a new tear of the lateral meniscus, and patella chondromalacia. Based on his examination, the physician believes the second surgery achieved good results.

Dr. Kienitz agreed with Dr. Robertson that Mr. Davis may need continued medical treatment in the form of medication and an independent exercise program. Concerning the 22% impairment rating, Dr. Kienitz believed Dr. Robertson may have made a mistake because he used the rating for a total meniscectomy, which is not the procedure performed on Mr. Davis. Dr. Robertson only accomplished partial meniscectomies, which under the Fifth Edition of the AMA guidelines equates to the 10% impairment of the lower extremity. At the same time, while a rating for his residual discomfort could not be combined with another rating under the Fifth Edition, Dr. Kienitz indicated a "discretional award may be considered."

Deposition
(EX G)

In a May 13, 2003 deposition, Dr. Kienitz, an osteopathic doctor who is board certified in preventive/occupational medicine, provided further comments about his assessment of Mr. Davis' case. Dr. Kienitz believes the disability impairment tables are similar in the Fourth and Fifth Editions of the AMA guidelines. Upon again reviewing Dr. Robertson's operative report, the physician indicated that a partial meniscectomy was performed. In other words, Dr. Robertson did not accomplish "full" meniscectomies, yet he based his impairment rating on total meniscectomies. Specifically, Dr. Robertson used 3% whole person for a total medial

meniscectomy and 1% whole person for the partial lateral meniscectomy, which equates to 10 % impairment for the lower extremity.

Dr. Kienitz used the impairment rating for partial meniscectomies to the medial meniscus and lateral meniscus and essentially reached the same lower extremity impairment rating of 10%. Dr. Robertson also added another rating for advanced arthritic changes in the medial and patellofermoral compartments. However, according to Dr. Kienitz, the impairment ratings for arthritis are based on radiographic evidence rather than direct observation. In other words, the impairment rating for arthritis is based on the cartilage separation measurement on x-rays. Based on his review of knee x-rays, Dr. Kienitz found "good joint spaces throughout." He did not find sufficient decrease in cartilage spacing to award an impairment rating for arthritis or degenerative joint disease. Although Dr. Kienitz suggested consideration of a discretional, or "add-on," award for Mr. Davis' pain, the doctor indicated that the AMA guidelines do not allow for such discretionary awards.

The AMA guidelines reflect an attempt to introduce objective standards into the impairment rating process by providing a diagnosis-based estimate. In his operation report, Dr. Robertson also reported the presence of chondromalacia and scar tissue; the later condition may be related to Mr. Davis' chronic irritation in his knee. The AMA guidelines do not consider either of these conditions. If not bound by the AMA guidelines, Dr. Kienitz probably still would not have added an additional rating because the cartilage spacing on the x-rays appeared normal.

Dr. Kienitz agreed that Dr. Robertson, as the operating surgeon, had a better opportunity to view the actual condition of the left knee during the procedure. Dr. Kienitz did not review any of the operation photographs.

The prescribed injections introduce into the knee some synthetic lubrication[13] which helps reduce chronic inflammation. Dr. Kienitz reviewed Dr. Horner's treatment note from March 2003 which indicated the medial joint line was too narrow for an injection at that point. Such a narrowing, if to a certain amount as specified under the AMA guidelines, would signify arthritic changes. Dr. Horner's comment also shows Mr. Davis is still having left knee problems.

The AMA guidelines do not permit the stacking of ratings. As a result, even though Mr. Davis had two knee operations with corresponding partial meniscectomies, the disability rating is not doubled, "unless it reaches a point where it's considered a total meniscectomy."

An unloader brace is probably appropriate for Mr. Davis' left knee condition since it would "hopefully" slow down its degeneration.

[13] "Q. Kind of like squirting WD-40 in there? A. Exactly, yes."

Travel Orders, Airline Itineraries and Receipts,
Reimbursement and Disability Compensation Claims
(CX 22 and CX 23)

Hernia

First Surgery – September 1999

On August 18, 1999, Dr. Lindborg submitted a request for a non-emergency medical referral for Mr. Davis for a workers' compensation injury. His designated travel status would be "medical." Dr. Lindborg authorized nine days for the referral, including travel days. The medical appointment was scheduled for September 16, 1999. Dr. Lindborg noted that any additional days required authorization from the medical department. The request was approved by a human resources representative on the same day. Mr. Davis' approved August 25, 1999 travel order for medical leave indicated the air carrier for Kwajalein to Honolulu was Aloha Airlines. The return flight was on an AMC[14] aircraft. Additionally, a rental vehicle was not authorized. His itinerary was Kwajalein to Honolulu and return. The trip dates were September 11, 1999 though September 28, 1999. In an attachment, Mr. Davis signed for receipt of $322.00 in advance travel pay for two days of hotel and meals, plus ground transportation. During this trip, for ground transportation, he was authorized one round trip cab ride between his hotel and the Honolulu airport ($50) and two cab trips for medical appointments ($25 each). His daily meal allowance was $45 and the hotel rate was $75. The attachment also stated, "the employee will submit an expense report (no receipts required) to the Hospital in order to clear this advance." Mr. Davis departed Kwajalein on September 11, 1999 and returned on September 28, 1999. He seeks reimbursement and disability compensation as follows:

Airfare, Honolulu to San Antonio, round trip	$ 700.00
Subsistence, $95 a day for 17 days	1,615.00
Car rental, $36.25 per day for 15 days	543.75
Total travel expenses	$2,858.75
(minus) advance travel pay	(322.00)
Net reimbursable expenses	$2,536.75
Temporary total disability compensation September 11, 1999 to September 28, 1999 ($89.40 per day based on comp. rate $626.40)	$1,610.82

Second Surgery – December 2000

Mr. Davis' travel order, dated November 28, 2000, states the purpose of the trip is personal leave and TDY (temporary duty) associated with Photo Sonics Manufacturing in Burbank, California. His itinerary lists a departure date of December 7, 2000, with an arrival in

[14]The parties are advised that I take judicial notice that "AMC" stands for Air Mobility Command. *See* U.S. Air Force website, http://www.af.mil/sites.

Honolulu on December 6, 2000.[15] His return trip starts on January 8, 2001 in Honolulu and ends in Kwajalein on January 9, 2001. The order authorizes a rental car and indicates the round trip travel is provided by AMC. The orders also note that Mr. Davis' point of hire was Las Vegas, Nevada and that his next-of-kin resides in Marble Falls, Texas. According to a Delta Airline itinerary, Mr. Davis flew from Las Vegas, Nevada to San Antonio, Texas[16] on December 9, 2000 and returned to Las Vegas on December 20, 2000. Mr. Davis departed Kwajalein on December 7, 2000 and returned on January 9, 2001. He seeks reimbursement and disability compensation as follows:

Airfare, Kwajalein to Honolulu, round trip	$ 956.00
Subsistence, $95 a day for 20 days	1,900.00
Car rental, $36.25 per day for 20 days	725.00
Hospital co-payment	217.00
Physician co-payment	294.00
Total reimbursable expenses	$4,092.00
Temporary total disability compensation December 7, 2000 to January 9, 2001 (same compensation rate of $89.40 per day)	$2,863.68

Left Knee

First Surgery – April 2000

1. On March 25, 2000, Dr. Thornhill submitted a request for an immediate medical referral for an appointment on April 4, 2000. The authorized number of medical referral days was five. The related, non-industrial injury occurred on November 16, 1999 and was covered under workers' compensation. A human resources representative approved the request the same day. Mr. Davis' April 7, 2000 travel order approved his medical leave trip. He departed Kwajalein on April 4, 2000 for Honolulu and returned on April 11, 2000. Transportation was provided by AMC. The authorization for a rental car was left blank. Mr. Davis departed Kwajalein on April 4, 2000 and returned on April 11, 2000 for the initial surgery. He seeks disability compensation as follows:

Temporary total disability compensation April 4, 2000 to April 11, 2000 ($85.38 per day based on comp. rate $597.66)	$ 597.66

2. Revised travel orders indicated that Mr. Davis combined vacation and TDY camera training on a trip from June 21, 2000 to July 25, 2000 from Kwajalein to Honolulu and return. His TDY dates were July 19, 2000 to July 21, 2000 with arrival and departure dates in "LAS" (Las Vegas) and a stop in BUR (Burbank, California airport) for camera training. A rental vehicle was authorized. He flew Continental Airlines on the outbound segment from Kwajalein.

[15]The trip involves crossing the international date line.

[16]Marble Falls and Llano, Texas are located near San Antonio, Texas. RAND MCNALLY ROAD ATLAS 98-99 (2001).

AMC provided transportation for the return segment. Mr. Davis seeks reimbursement as follows:

Airfare, Kwajalein to Honolulu, round trip	$ 956.00

3. On December 18, 2000, Mr. Davis purchased a Southwest Airlines round trip ticket between Las Vegas and San Antonio. On December 27, 2000, Mr. Davis flew to San Antonio and saw Dr. Robertson on December 29, 2000 for an evaluation of his continuing left knee pain. He returned to Las Vegas on December 30, 2000. The cost of the airfare was $554.00 and charged to a Visa credit card.[17] Mr. Davis seeks reimbursement and disability compensation as follows:

Airfare Las Vegas to San Antonio, round trip	$ 554.00
Subsistence, $95 a day for 4 days	380.00
Car rental, $36.25 for 4 days	145.00
Total reimbursable expenses	$1,079.00
Temporary total disability compensation December 27, 2000 to December 30, 2000 (same daily compensation rate)	$ 341.52

Second Surgery – April 2001

1. On an amended travel order, approved March 31, 2001, Mr. Davis was authorized immediate medical referral and a TDY. The TDY involved camera refurbishment at Burbank California April 3 and 4, 2001. His departure date to Honolulu was March 24, 2001; the return date to Kwajalein was April 10, 2001 (which reflected a change from the original travel date of April 6, 2001). A rental car was authorized. Both outbound and return flights were on Aloha Airlines. The cost of the trip was charged to Mr. Davis' American Express Corporate Services business credit card.[18] A hand written note by the total cost for this ticket states, "pd by carrier." A hotel receipt indicates Mr. Davis arrived in Honolulu March 23, 2001 and spent two nights at the room rate of $180; taxes $20.54; and parking $11.00 a day. An American Airline ticket receipt, purchased March 16, 2001 with the American Express charge card, indicates Mr. Davis was to proceed from Honolulu on March 25, 2001 to San Antonio, Texas. Then, Mr. Davis would depart San Antonio on April 2, 2001 and travel to Burbank, California. Two days later, on April 4, 2001, on the same ticket, he would depart Los Angeles for Honolulu. The cost of the American Airlines ticket was $873.17. However, an April 2, 2001 American Airlines itinerary indicates Mr. Davis actually departed San Antonio on April 8, 2001 and flew to Honolulu the same day. His April 8, 2001 Honolulu hotel receipt indicates room rate of $140; taxes of $15.97 and parking $11.00. A receipt shows the associated rental car fee charged to a Visa credit card was $46.95. Mr. Davis departed Honolulu on April 9, 2001 and arrived on Kwajalein April 10, 2001. He seeks reimbursement and disability compensation as follows:

[17]The last four account numbers are "8765."

[18]This account is captioned, "Raytheon, Kenneth Davis" and the last four account numbers are "1003."

Airfare Honolulu to San Antonio, round trip	$ 873.17
Hotel, March 23 and 24, 2001	429.02
Hotel, April 8, 2001	168.95
Car rental Honolulu, one day	46.95
Car rental San Antonio $36.25 for 15 days	543.75
Subsistence, $95 a day for 15 days	1,451.46
Total reimbursable expenses	$3,513.30
Temporary total disability compensation March 24, 2001 to April 10, 2001 (daily compensation rate of $85.38)	$1,451,46

2. According to his May 3, 2001 travel order, Mr. Davis traveled from Kwajalein to Honolulu, round trip, on Aloha Airlines for medical purposes and a TDY associated with a camera refurbishment progress report in Burbank, California from June 2 to June 5. His departure date was May 30, 2001; his arrival in Honolulu was May 29, 2001. The American Express business card was used to purchase the airfare. His return trip occurred between June 12, and 14, 2001.[19] A rental car was approved. A hotel receipt for $155.97 shows Mr. Davis spent the night of May 29, 2001 in Waikiki; the room was charged to a Discover card.[20] A United Airlines receipt indicates he then flew to Los Angeles on May 30, 2001. He returned to Honolulu from Los Angeles on June 9, 2001. The ticket was charged to Visa. An American Express receipt shows Mr. Davis departed Las Vegas on June 3, 2001 and arrived in San Antonio the same day. On June 4, 2001, Mr. Davis left San Antonio.[21] A rental car receipt for June 4, 2001 from San Antonio shows a charge to a Discover card of $42.55. He seeks reimbursement and disability compensation as follows:

Airfare, Honolulu to Los Angeles, round trip	$ 469.30
Airfare, Las Vegas to San Antonio, round trip	574.50
Hotel, March 29, 2001	155.97
Car rental San Antonio, one day	42.55
Subsistence, $95 a day for 1 day	95.00
Total reimbursable expenses	$1,337.32
Temporary total disability compensation June 3, 2001 to June 6, 2001 (daily compensation rate of $85.38)	$ 341.52

3. Mr. Davis' September 7, 2001 travel order approved vacation and TDY from Kwajalein on September 26, 2001 with a return on October 16, 2001 on Aloha Airlines. Mr.

[19]An Aloha Airlines passenger receipt, issued May 2, 2001, shows Mr. Davis departing Honolulu on June 11, 2001 for Kwajalein. A Continental Airlines passenger receipt, issued June 11, 2001, shows Mr. Davis departing Honolulu on June 13, 2001. Again, the airfare was purchased with the American Express business card.

[20]Discover credit card, last four "8298."

[21]Most of this document is too faint to be legible.

Davis' arrival in Honolulu was September 25, 2001; his departure date for the return to Kwajalein was October 15, 2001. The $871.60 ticket was charged to the American Express business card. During the trip, Mr. Davis was to check camera status in Burbank, California, October 4 to October 6, and camera equipment in White Sands, New Mexico, October 9 and 10. A rental car was authorized. On September 26, 2001, Mr. Davis flew from Honolulu to Las Vegas; he returned to Honolulu from Las Vegas on October 13, 2001. This United Airlines' ticket was purchased with a Visa credit card. On September 29, 2001, Mr. Davis flew from Las Vegas to San Antonio. On October 4, 2001, he departed San Antonio for El Paso, Texas. On October 6, 2001, Mr. Davis departed El Paso, Texas for Las Vegas. This Southwest Airlines $425.25 ticket was purchased with the American Express business card. Between September 29, 2001 and October 4, 2001, Mr. Davis rented a car for $212.75 with a Discover card. He departed Los Angeles on October 13, 2001 for Honolulu. On September 26, 2001, Mr. Davis spent $43.15 using a Visa credit card on a rental car in Honolulu. His hotel room on Waikiki for the night of September 25, 2001 cost $140.25[22] and was charged to the Visa account. The two nights of October 13 and 14, 2001 on Waikiki cost $151.70, including $18 for parking. The expense was placed on the American Express business card. Mr. Davis seeks reimbursement and disability compensation as follows:

Airfare, Kwajalein to Honolulu, round trip	$ 871.60
Airfare, Honolulu to Las Vegas, round trip	419.80
Airfare, Las Vegas to San Antonio, round trip	425.25
Car rental, September 25, 2001	43.15
Car rental, September 29 to October 4, 2001	212.75
Car rental, October 13 and 14, 2001	86.19
Hotel, September 25, 2001	140.25
Hotel, October 13 and 14, 2001	151.70
Subsistence, $95 a day for 7 days	665.00
Total reimbursable expenses	$3,015.69
Temporary total disability compensation	
September 29, 2001 to October 4, 2001	$ 512.28
(daily compensation rate of $85.38)	

4. An American Express Corporate Services itinerary shows Mr. Davis departed Honolulu for Las Vegas on July 24, 2002. He departed Las Vegas for San Antonio on July 29, 2002. On August 3, 2002, Mr. Davis left San Antonio for Las Vegas. On August 15, 2002, he flew from Las Vegas back to Honolulu. All flight segments were on Delta Airlines. The airline ticket receipt shows a charge of $1,119.00 on the Discover credit card. Mr. Davis seeks reimbursement and disability compensation as follows:

Airfare, Honolulu to San Antonio, round trip	$1,119.00
Subsistence, $95 a day for 6 days	
(July 29 to August 3, 2002)	570.00
Total reimbursable expenses	$1,689.00

[22]Including two phone calls at 99 cents each.

Temporary total disability compensation July 29 to August 3, 2002 (daily compensation rate of $85.38)	$ 512.28

5. An American Express Corporate Services itinerary shows Mr. Davis traveled from Kwajalein atoll on Aloha Airlines to Honolulu, Hawaii on October 2, 2002. On October 21, 2002, he departed Honolulu for Las Vegas on Delta Air Airlines. Mr. Davis left Las Vegas on October 24, 2002 for Philadelphia (Delta). On October 27, 2002, he traveled from Philadelphia to Jacksonville, Florida (Delta). The next day, October 28, 2002, he went on to San Antonio, Texas (Delta). On October 31, 2002, Mr. Davis left San Antonio and returned to Honolulu (Delta). The airline ticket receipt for all the Delta Airlines segments indicates a total charge of $1,119.00 placed on the American Express credit card. Finally, on November 4, 2002, Mr. Davis departed Honolulu; he arrived in Kwajalein on November 5, 2002 (Aloha). A handwritten notation states, "$1119.00 Delta Discover fare." Mr. Davis seeks reimbursement and disability compensation as follows:

Airfare, Honolulu to San Antonio, round trip	$1,119.00
Subsistence, $95 a day for 4 days	380.00
Total reimbursable expenses	$1,499.00

Temporary total disability compensation October 28 to October 31, 2002 (daily compensation rate of $85.38)	$ 341.52

6. Additional medical expenses include a fee of $40.20 for Dr. Robertson and prescription drugs in the amount of $120.00.

E-mail and Written Correspondence
(CX 24)

On December 12, 1998, Ms. Cindy Main informed Mr. Davis that the workers' compensation committee had denied his request for a medical referral because the services he requested were available on the island. She indicated that his claim for disability compensation and medical benefits would be processed. Pending a final decision, he should consider the claim denied. If the claim was found to be compensable then he could "submit all paid receipts/insurance claim forms to Liberty who will either reimburse you or your personal health insurer"

On March 31 1999, Mr. Davis explained to Ms. Diaz that he did not immediately seek medical treatment for his hernia because he thought the problem was just a pulled stomach muscle. The hernia was only recently discovered. A difference of opinion about the best course of treatment existed between the Kwajalein doctors and his personal physician. Mr. Davis wanted to follow his personal physician's advice on the matter.

At the beginning of October 2000, Mr. Davis attempted to obtain authorization for another hernia repair during his trip back to Texas in December 2000. On October 25, 2000, Mr.

Davis described to Ms. Diaz some of the logistical issues associated with obtaining medical treatment for his continuing hernia problem (in July 2000). He recounted attempting to see Dr. Nguyen for a persistent bulge in his navel area. Since Dr. Nguyen was unavailable, Mr. Davis saw her partner, Dr. Thomas, who diagnosed a recurrent hernia. The doctor explained that the area remained weak and any type of exertion, including coughing could cause a recurrence.

Subsequently, Mr. Davis asked the Insurer for permission to see Dr. Nguyen. When he didn't receive a response, Mr. Davis traveled to Honolulu and waited a couple days while the Insurer unsuccessfully attempted to find a physician who would agree to perform the recurrent hernia surgery. Apparently in response to the Insurer's desire to obtain an independent examination, Mr. Davis noted Dr. Paget's recent diagnosis of a recurrent hernia and his opinion that a mesh repair was warranted. He asked Ms. Diaz to review his medical records from Kwajalein.

In a November 2000 e-mail string, Mr. Davis initially notes that the Insurer had previously permitted him to travel off-island to Honolulu and then fly to mainland at his own expense for medical treatment. He asserts that due to other health conditions he heals slowly. Additionally, he resides on the second floor of the BQ (bachelor quarters) and has to climb up and down stairs for all daily activities. He doesn't have anyone on Kwajalein to help him. He asserted the insurance company couldn't force him to accept medical care on Kwajalein. He also recalled how he had stopped over in Honolulu in July 2000 for two days in an attempt to have a surgeon look at his hernia. Based on that experience, Mr. Davis was not interested in having a doctor in Honolulu help him.

Ms. Diaz responded by indicating the medical records seem to contain different diagnoses about the second hernia. An un-named physician seems to diagnose a hernia different from the first one; whereas, Dr. Paget diagnosed a recurrent hernia. She inquired whether Mr. Davis would be able to lay over in Honolulu during his Christmas vacation trip for an evaluation. Ms. Diaz indicated the Insurer would not agree to pay for travel expenses if a qualified doctor were available on Kwajalein. While the Insurer had agreed to airfare to Honolulu for the first surgery, Ms. Diaz did not agree to accept liability for Mr. Davis' additional surgery at that time. She intended to discuss his situation with Dr. Nguyen and have the physician discuss the case with Dr. Thomas. Ms. Diaz also noted that Dr. Paget was a surgeon. Ms. Diaz emphasized that at best the Insurer would only accept liability for the medical treatment and not the travel expenses.

On December 3, 2000, Mr. Davis informed Ms. Diaz that he was arranging for the hernia repair with Dr. Nguyen in Texas because his hernia was "sore" and he was tired of waiting for the Insurer's decision. Dr. Nguyen's nurse had indicated no one from the Insurer had contacted her about his case in the past month.

Workers' Compensation Referral Instructions.
(CX 25)

Employee cash advances are available up to $120 a day. The employee will not be reimbursed for phone calls and only taxi fares associated with the airport and medical

appointment are reimbursed. Temporary total disability compensation will be paid for the time lost at work. If the claim is denied, then the employee is liable for all expenses, including accommodations and transportation. Finally, an expense report must be filled out upon completion of the trip.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Stipulations of Fact and Preliminary Findings

The parties have stipulated to the following facts: At the time of the initial hernia and left knee injuries, an employer-employee relationship existed between the parties. The initial hernia and left knee injuries arose out of and during the course of Mr. Davis' employment. The initial hernia injury occurred on March 11, 1998. The initial left knee injury occurred on November 16, 1999 (TR, pages 28 to 30).

Based on the parties' stipulations of fact, I find that on March 11, 1998, Mr. Davis suffered a work-related umbilical hernia. On November 16, 1999, under the Defense Base Act, Mr. Davis also suffered a work-related injury to his left knee.[23]

Issue No. 1 – Average Weekly Wage

In determining the amounts of disability compensation paid to Mr. Davis, the Employer/Insurer utilized an average weekly wage of $640. While both parties now agree the figure was incorrect and Section 10 (c) mandates a different value; they disagree on the appropriate average weekly wage. For any disability associated with the 1998 hernia injury, the Claimant asserts the average weekly wage should be $939.60; the Employer believes $886.32 is warranted. For disability compensation for the 1999 left knee injury, the Claimant's average weekly wage figure is $896.49; the Employer's amount is $992.87.

Under Section 10 of the Act, 33 U.S.C. § 910, determining the average weekly wage involves a two step process. First, using one of three alternative methods, Sections 10 (a) to (c), an average annual earnings is established. Second, Section 10 (d) indicates the average weekly wage is the average annual earnings divided by 52.

Because Mr. Davis usually worked extensive overtime and was not a strict five day nor six day per week worker, Section 10 (a) does not apply. Likewise, since Mr. Davis worked regularly for more than a year prior to the injuries and the record contains no information about the wages of other employees in the same class as Mr. Davis, I am not able to use Section 10 (b).

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[23]Under the Defense Base Act, the United States Supreme Court has allowed benefits where the injury did not occur within the space and time boundaries of work, but the employee was in a "zone of special danger." In *O'Leary v. Brown-Pacific-Maxon, Inc*., 340 U.S. 504 (1951), the employee, while spending the afternoon in the employer's recreational facility near the shoreline in Guam, drowned while attempting to rescue two men in a dangerous channel. The Court stated that "[a]ll that is required [for compensability] is that the obligations or conditions' of employment create the zone of special danger out' of which the injury arose." *O'Leary*, 340 U.S. at 505. *See also, Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978).

Since neither Section 10 (a) or Section 10 (b) are applicable, I will utilize Section 10 (c) to calculate Mr. Davis' average weekly wage. *See Todd Shipyards Corp v. Director, OWCP*, 545 F. 2d 1176 (9th Cir 1976), *aff'g and remanding in part*, 1 BRBS 159 (1974). Section 10 (c), states in part:

> such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee. . . shall reasonably represent the annual earning capacity of the employee.

According to the Benefits Review Board ("BRB" and "Board"), the purpose of Section 10 (c) is to arrive at a sum which reasonably represents the claimant's annual earnings at the time of his injury. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). I must make a fair and accurate assessment of Mr. Davis' earning capacity which represents the amount he would have the potential of earning absent his injuries. *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 757 (7th Cir. 1979). For traumatic injury cases, the average weekly wage is determined as of the time of the injury for which compensation is claimed. *Hall v. Consolidated Employment Systems, Inc.,* 139 F.3d 1025 (5th Cir. 1998). An administrative law judge has broad discretion in determining the claimant's pre-accident annual earning capacity. *Matthews v. Mid-States Stevedoring, Corp*., 11 BRBS 509, 513 (1979).

An employee's salary at the time of the injury may be an appropriate reflection of earning capacity. *Hayes v. P & M Crane Co*., 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991). The remaining factors to be considered under Section 10 (c) include: all of the employee's relevant work experience, *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991); earning figures higher than that which was previously enjoyed by the claimant, *Harrison v. Todd Pacific Shipyards, Co*., 21 BRBS 339, 345 (1988); other income if the injury precludes not only the work engaged in at the time of the injury but also other previous employment that generated significant income, *Wise v. Horace Allen Excavating, Co*., 7 BRBS 1052, 1057 (1978);[24] and, overtime if a regular and normal part of the claimant's employment, *Bury v. Joseph Smith and Sons*, 13 BRBS 694, 698 (1981).

With these principles in mind, I note that other than overtime pay, the specified considerations under Section 10 (c) are not applicable in Mr. Davis' situation. Since Mr. Davis' overtime is reflected in his report of annual income to the federal government, I believe his income tax returns provide the best basis for determining the average annual wages for the March 11, 1998 and November 16,1999 injuries.[25] At the same time, the record only contains

[24]The Board held that calculation of an average weekly wage should include income from non-maritime employment when the claimant had significant income from a contracting business because the claimant's wage earning capacity was diminished in all income-producing activities due to his work related injury.

[25]Both parties focused on these two injury dates and did not raise the issue of whether the recurrent hernia and the second left knee operation represented either a) a natural continuation of the initial injury (in the Ninth Circuit, this may represent a latent traumatic injury such that the average weekly wage is based on the date the disability became manifested, *Johnson v. Director, OWCP,* 911 F.2d 247 (9th Cir. 1990), *cert. denied* 499 U.S. 959 (1991)); or, b)

Mr. Davis' annual federal tax returns and one pay stub from December 2001; consequently, I really have no information to accurately assess Mr. Davis' actual earnings from January 1 to March 11, 1998 and January 1 to November 16, 1999. As a result, I must essentially rely on the prior year's annual earnings report to determine the average weekly wage at the time of the respective injuries. In 1997, the year prior to the March 11, 1998 hernia injury, Mr. Davis earned $46,089. Applying that annual earnings under Section 10 (d), I find the average weekly wage for the March 11, 1998 injury is $886.33 ($46,089/52). Similarly, because Mr. Davis earned $51,629 in 1998, the average weekly wage for the November 16, 1999 injury is $992.87 ($51,629/52).

Issue No. 2 – Entitlement to Medical Benefits and Associated Incidental Expenses

Based on the parties' stipulations of fact, Mr. Davis has established that he suffered two compensable injuries under the Act on March 11, 1998 and November 16, 1999. For these injuries, Mr. Davis received various forms of medical treatment in numerous locations from diverse physicians. The Employer has raised issues concerning the necessity of some of the medical care, Mr. Davis' choice of physicians, and the appropriateness of reimbursement for some of the associated incidental expenses. To resolve these issues, I will first review some principles concerning medical treatment for compensable injuries under the Act. Then, I will address the specific issues related to each of the four major medical procedures in this case.

Principles

Under Section 7 (a) of the Act, 33 U.S.C. § 907 (a), if an employee suffers a compensable injury, then the employer is responsible for those reasonable and necessary medical expenses incurred as a result of a work-related injury to the extent the injury may require. *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). The employer's responsibility is continuing and exists even if a claim for disability compensation is time-barred by Section 12 and Section 13 of the Act,[26] *Strachen Shipping co. v. Hollis,* 460 F.2d 1108 (5th Cir.) *cert. denied,* 409 U.S. 887 (1972), or fails to satisfy the Section 8 requirements for disability compensation, *Ingalls Shipbuilding v. Director, OWCP,* 991 F.2d 163, 166 (5th Cir. 1993). In other words, entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988).

The employer must provide medical treatment for such period as the nature of the injury or the process of recovery may require. In order to hold the employer liable for medical expenses, the treatment must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). If the treatment is unnecessary for the injury, payment may be

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arose as a the result of subsequent work-related aggravation (re-aggravation constitutes a new injury which sets a new injury date for calculation of the average weekly wage. *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140, 149 (1991)).

[26]In part, Section 12 (a) of the Act, 33 U.S.C. § 912 (a) requires that a claimant provide notice of a work-related injury within 30 days of the date of injury. According to Section 13 (a), 33 U.S.C. § 913 (a), a claim for disability compensation will be barred unless it is filed within one year after the injury. In Mr. Davis' case, the Employer's counsel has not raised any viable issue concerning timely notice.

rejected. *Ballesteros v. Williamette W. Corp*., 20 BRBS 184, 187 (1988). On the other hand, if an administrative law judge determines a procedure is reasonable and necessary, then he or she may direct an employer to authorize a specific future surgical procedure. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991).

The claimant carries the burden to establish the necessity of medical treatment for, and that medical expenses are related to, a compensable injury. *See generally Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112 (1996) and *Pardee v. Army & Air Force Exchange Service,* 13 BRBS 1130 (1981). A claimant may establish a *prima facie* case for compensable medical treatment if a qualified physician indicates the treatment is necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.,* 16 BRBS 255 (1984). At the same time, an employee may not receive an award of medical benefits absent evidence of medical expenses incurred in the past or treatment necessary in the future. *Ingalls,* 991 F.2d at 166.

Under Section 7, a claimant is entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. General Dynamics Corp.,* 22 BRBS 356 (1989). Usually, travel expenses relate to an employee's right to choose his physician. As a guide, 20 C.F.R. § 702.403 states that in evaluating the choice of physician, "consideration must be given to availability, the employee's condition, and the method and means of transportation." While other "pertinent" factors must be considered, "25 miles from the place of injury or the employee's home is a reasonable distance to travel." If competent medical care is available close to a claimant's residence, the medical expenses can reasonably be limited to those costs that would have been incurred had the treatment been provided locally rather than where the treatment was actually incurred. *Schoen,* 30 BRBS at 112;[27] *see generally, Welch v. Pennzoil Co.,* 23 BRBS 395, 401.[28]

If a claimant establishes the existence of a compensable injury, then through the causation presumption under Section 20 (a), the employer remains responsible for all natural consequences of that injury, whether they occur at work or away from work. *Bludworth Shipyards v. Lira,* 700 F.2d 1046 (5th Cir. 1983) and *Kooley v. Marine Industries N.W.,* 22 BRBS 142 (1989). As a result, when an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation, the employer is liable for the entire disability and the medical expenses due to both injuries if the subsequent injury or aggravation is the natural and unavoidable result or consequence of the original work-related injury.[29] *Bludworth,* 700 F.2d at 1050.

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[27]In that case, the claimant, a resident of Austin, Texas, procured medical treatment for her back and leg injuries in Boston, Massachusetts. The Board determined the claimant failed to prove the reasonableness of such treatment since similar care was available much closer in Houston, Texas. The Board upheld the award of medical costs associated with treatment in Houston and incidental expenses, including roundtrip airfare to Houston and subsistence payments based on the federal *per diem* rate for Houston.

[28]The Board directed the administrative law judge to determine the reasonableness of a claimant's selection of a physician located 300 miles from the claimant's residence.

[29]For example, in *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991), the Benefits Review Board affirmed the administrative law judge's finding that the claimant's recurring back problems were natural and unavoidable consequences of his employment.

The employer may sever the work-related connection of subsequent claimed injuries generated by the statutory presumption. To be relieved of liability for that portion of the disability attributable to the second injury or aggravation, the employer may present either a) substantial contrary evidence of an absence of a connection; or, b) evidence of an intervening cause, such as intentional conduct, for the subsequent injury. *Merrill v. Todd Pacific Shipyards Corp.* 25 BRBS 140, 144 (1991), *James v. Pate Stevedoring Co.* 22 BRBS 271 (1989), and *Bailey v. Bethlehem Steel Corp.* 20 BRBS 14 (1987). The court in *Bludworth,* 700 F.2d at 1050, further explained, "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause."

Finally, if a claimant's employment aggravates a non-work-related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability may be compensable. *See Gardner v. Bath Iron Works*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981).

A. First Hernia Repair

Background

On March 11, 1998,[30] while moving heavy cameras, Mr. Davis felt a pull in his stomach which he believed involved a muscle. However, sometime later, he observed a persistent lump in his navel area and sought medical attention. On March 27, 1998, Mr. Davis first presented his concern about the navel lump to his personal physician, Dr. Hogue, while he was in Texas on personal leave.[31] Dr. Hogue indicated surgery might be warranted if the lump caused him problems. On Kwajalein in August 1998, when Mr. Davis sought medical attention and reported no pain, Dr. Thornhill prescribed a very conservative approach of weight reduction. On December 12, 1998, the Employer denied Mr. Davis' request for a medical referral off-island because the necessary medical care was available on Kwajalein. Later in December 1998, prior to returning to Texas on vacation, Mr. Davis sought Dr. Lindborg's assistance to obtain medical leave to see Dr. Hogue. At that time, Mr. Davis had begun to experience discomfort with his hernia. On December 30, 1998, Mr. Davis returned to Dr. Hogue in Texas with complaints of pain associated with the hernia. The physician recommended corrective surgery and also concurred with Dr. Thornhill's weight reduction suggestion.

In March 1999, Mr. Davis informed the Employer that a difference of medical opinion existed concerning the necessary medical treatment for his hernia. Mr. Davis also went to Dr. Lindborg for assistance because his claim in regards to the hernia had been rejected. He reported

[30]In his hearing testimony, Mr. Davis indicated that sometime in 1998, a few months before his March 1998 visit with Dr. Hogue, he had experienced the stomach pull while lifting a heavy camera. Upon reflection, he concluded that his claimed injury date of March 11, 1998 was incorrect. However, since the parties have stipulated that the injury date is March 11, 1998, I will continue to utilize that date. Further, the average weekly wage determination, based on Mr. Davis' annual earnings for 1997 remains unaffected by his hearing recollection because his testimony still places the initial injury sometime in 1998, prior to his March 27, 1998 visit with Dr. Hogue.

[31]During this March 27, 1998 visit, Mr. Davis did not describe to Dr. Hogue how he believed the hernia developed.
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pain and protrusion associated with the hernia and expressed his desire to have a physician in Texas repair the hernia. Dr. Lindborg indicated the hernia was easily correctable by surgery.

Back in Texas again in June 1999, Mr. Davis was examined by Dr. Nguyen who diagnosed an umbilical hernia and scheduled surgery for September 16, 1999. In August 1999, since sufficient medical intervention was not available on Kwajalein, Dr. Lindborg authorized nine days of medical leave for a September 16, 1999 medical appointment and travel between Kwajalein and Honolulu. Mr. Davis departed Kwajalein on September 11, 1999. On September 16, 1999, in Llano, Texas, Dr. Nguyen performed a hernia repair operation. On September 28, 1999, Mr. Davis returned to Kwajalein. On the same day, after his return, a physician noted that the operation was a first degree repair without mesh.

Discussion

My evaluation of the Employer's liability for the expenses relating to the medical treatments of the various injuries, including the first hernia operation, can be split into two areas. Since the reasonableness of the medical fees themselves have not been challenged, I first address whether the medical procedure was a necessary medical treatment. A determination that the medical procedure was necessary will essentially establish the Employer's liability for the medical costs associated with that medical treatment and satisfy a critical prerequisite for consideration of incidental expenses. Second, concerning other associated expenses, such as travel costs and subsistence, a determination about the reasonableness of Mr. Davis' choice of physician in terms of location will establish the extent to which the Employer is responsible for incidental expenses.

Initially, invasive medical treatment for Mr. Davis' March 11, 1998 hernia injury was not necessary. In the spring and late summer of 1998, according to Dr. Hogue and Dr. Thornhill, Mr. Davis' umbilical hernia did not require medical attention due to the absence of any pain symptoms. However, by December 1998, Mr. Davis began to experience pain and irritation associated with the navel hernia protrusion. Upon examination, Dr. Hogue determined corrective surgery was warranted and medical intervention became necessary. In March 1999, Dr. Lindborg essentially concurred that surgical treatment was appropriate. In June 1999, Dr. Nguyen scheduled Mr. Davis for a hernia repair operation. Based on the readily apparent consensus of Dr. Hogue, Dr. Lindborg, and Dr. Nguyen, I find the surgical repair of Mr. Davis' work-related umbilical hernia was necessary by June 1999. Accordingly, Mr. Davis has established that the September 16, 1999 corrective surgery for his umbilical hernia was a necessary medical treatment. The Employer is liable for the medical costs associated with the first hernia surgery.

Having determined that the hernia repair on September 16, 1999 was necessary, I turn to one of the principle issues in this case, whether Mr. Davis has established the reasonableness of his selection of Dr. Nguyen in Llano, Texas, as the surgeon for the operation. In the August 1999 medical travel order request, Dr. Lindborg indicated that non-emergency surgical repair of Mr. Davis' hernia exceeded the capabilities of the medical facilities on the island at that time. As a result, Mr. Davis' hernia repair had to be accomplished somewhere else. Mr. Davis chose Dr. Nguyen in Texas.

Mr. Davis asserts his selection of Dr. Nguyen was reasonable because he had family members nearby in Texas to provide assistance after the surgery. In contrast, as an unmarried individual living in quarters on the second floor, Mr. Davis would have experienced a difficult post-operative recovery in Kwajalein which may have extended his recovery period. Mr. Davis also notes that the Insurer approved his choice of Dr. Nguyen by paying the physician's medical bill.

The starting point for resolving this issue is Kwajalein Atoll. Located in the Marshall Islands, Kwajalein is 2,446 miles from Honolulu, Hawaii, which in turn is located 2,556 miles from Los Angeles;[32] San Antonio is another 1,372 miles from Los Angeles.[33] Kwajalein is the location of Mr. Davis' residence, usual place of employment, and place of injury. However, once Dr. Lindborg determined medical care for Mr. Davis' hernia was not available locally on the island, the regulation's 25 mile radius reasonableness standard for the selection of a physician no longer applied. Instead, I turn to other considerations. For the reasons set out below, I conclude Mr. Davis has failed to prove the reasonableness of his selection of a physician in Texas for the repair of his hernia.

The record establishes that when medical treatment was not available on Kwajalein, employees were sent to Honolulu, Hawaii for medical care. The medical travel order Dr. Lindborg requested for the hernia surgery only authorized round trip transportation to Honolulu. On two additional occasions during Mr. Davis' employment on Kwajalein, when he had his first knee surgery in April 2000 and when he attempted to obtain surgical repair for his recurrent hernia in July 2000, the medical treatment was located in Honolulu. Notably, in their November 2000 e-mail exchange, Mr. Davis and Ms. Diaz recalled that for the first hernia surgery, the Employer agreed to pay for transportation to Honolulu and return while Mr. Davis traveled to the mainland for the surgical procedure at his own expense.[34]

I have considered Mr. Davis' not insignificant concern about post-operative support and the convenience of having relatives present. However, Mr. Davis' concern about such support was not constant. Significantly, Mr. Davis traveled no farther than Honolulu for his first knee surgery and he was working with the Insurer in July 2000 to have his second hernia repair also accomplished in Honolulu while he was there. Additionally, family-member post-operative support was not Mr. Davis' only option. Although Dr. Lindborg's request for medical leave did not include attendant care, and Mr. Davis asserted the Insurer would not have provided that assistance, had post-operative attendant care been necessary in Hawaii, the Employer would have been liable for that cost. Besides the family-support argument, which has diminished persuasion, Mr. Davis has presented little convincing evidence to support his claim that the Employer must pay for the costs associated with an additional 3,900 miles of travel from Honolulu because it was reasonable for him to have his hernia surgery in Llano, Texas. Upon balance, I find Mr. Davis' stated interest in having his hernia surgery in Texas, while understandable, does not

[32]*See* October 2, 2002 travel itinerary, CX 23.

[33]RAND MCNALLY ROAD ATLAS 140 (2001).

[34]Mr. Davis' apparent agreement to this arrangement does not necessarily negate his present reimbursement claim for the mainland travel expenses.

establish the reasonableness of his physician selection. Accordingly, Mr. Davis has failed to prove that his hernia operation had to be accomplished in Llano, Texas by Dr. Nguyen.

Since I have concluded Mr. Davis has failed to establish the reasonableness of his selection of Llano, Texas as the location for his hernia operation, the Employer is not liable for the incidental expenses unique to Mr. Davis' trip to San Antonio. On the other hand, since Dr. Lindborg indicated appropriate medical treatment was not available on Kwajalein at that time, Mr. Davis would have had to travel to at least Honolulu for proper care. Within that context, the Employer remains liable for the incidental expenses that would have arisen if Mr. Davis' hernia repair had been accomplished in Hawaii. Applying that consideration leads to partial approval of Mr. Davis' claimed incidental expenses.

Airfare. Because Mr. Davis failed to prove the reasonableness of his trip to Texas for hernia surgery, his reimbursement claim of $700 for roundtrip airfare between Honolulu and San Antonio is denied.

Subsistence. During the trip to repair his hernia, Mr. Davis was gone for 17 days. He seeks subsistence reimbursement for each day at $95 a day, for a total of $1,615. Since at best, Mr. Davis only needed to travel to Honolulu for surgical care, both the duration of the claimed subsistence and his daily subsistence rate raise issues.

Determining the appropriate length for Mr. Davis medical leave is problematic because: a) the evidence about his September 1999 trip is incomplete and contradictory; and, b) he is entitled only to the amount of subsistence associated with having the procedure accomplished in Honolulu.

In August 1999, when Dr. Lindborg determined Mr. Davis needed medical care for his hernia, he approved only nine days of medical leave, including two travel days. Reasonably, Dr. Lindborg did not expect Mr. Davis would be able to travel and return to Kwajalein immediately after the hernia surgery. The doctor also specifically added that any extension to the trip required approval of the medical department. Yet, while the record contains no evidence that Mr. Davis obtained approval for more than nine days, when his medical order for the September 16, 1999 medical appointment date was issued, the duration of the trip was listed as seventeen days. As the surgeon for the operation, Dr. Nguyen was certainly in a better position than Dr. Lindborg to determine when Mr. Davis could return to Kwajalein. Unfortunately, Dr. Nguyen's sole input in the record is his release of Mr. Davis to light duty on September 28, 1999 which happens to be the same day Mr. Davis returned to Kwajalein.

As a result of this evidentiary jumble, and considering that Mr. Davis bears the responsibility for providing clarity, I will use Dr. Lindborg's initial nine day authorization as a reasonable duration for a hernia repair operation in Honolulu. Because the physician only authorized two travel days, his estimation is also consistent with having the surgery conducted in Honolulu. Wrapping the nine days of medical leave around the September 16, 1999 operation day, I conclude Mr. Davis is entitled to subsistence from September 15, 1999 through September 24, 1999.

Although Mr. Davis' claim of seventeen days overstates the approved duration for subsistence reimbursement, his claimed daily *per diem* rate of $95 understates the Employer's liability for the daily subsistence rate in Honolulu, Hawaii. Had the surgery been conducted in Honolulu, based on the federal *per diem* rate for that city in 1999, the Employer would have been liable for a daily rate of $171.[35] Although the instructions attached to Mr. Davis' travel order indicated a maximum daily rate of $120, that form was used to calculate advance travel pay.[36] As a result, I find the federal rate more probative on the issue of appropriate subsistence for medical treatment in Honolulu. Applying the federal *per diem* rate of $171 to the nine days of subsistence, the Employer is liable for $1,539.00 ($171 x 9) in subsistence.

Ground Transportation. Mr. Davis claims reimbursement for a rental car for 15 days at the daily rate of $36.25, for a total of $543.75. Since Mr. Davis' travel order did not authorize the use of a rental car, his claim in that amount is denied. Instead of a rental car, the travel order permitted a $50 round trip cab fare for the airport and $25 cab fares for his medical appointments. On that basis, ground transportation costs in the amounts of $50 for the airport and $75 for at least three medical appointments (pre-operation, operation, and post-operation) are reasonable. I approve the reimbursement of $125 in ground transportation costs.

Summary. Of Mr. Davis' total claim of $2,858.75 for incidental expenses, I have approved payment of $1,539.00 for subsistence and $125 for ground transportation costs for a total of $1,664.00. Prior to his trip, Mr. Davis received advanced travel pay for hotel, meals and ground transportation in the amount of $322. As a result, I find the Employer must reimburse Mr. Davis an additional $1,342.00 ($1,664 - 322).

B. Second Hernia Repair

Background

On September 28, 1999, upon his return to Kwajalein, a doctor noted Mr. Davis had just received a first degree hernia repair without mesh. On October 28, 1999, another doctor examined the surgery site and concluded it was a solid repair. The doctor permitted Mr. Davis to lift objects weighing up to 50 pounds.

In July 2000, while in Texas, Mr. Davis tried to see Dr. Nguyen for a continuing bulge in his navel. Dr. Nguyen was unavailable so Mr. Davis saw her partner, Dr. Thomas. Dr. Thomas found a recurrent hernia. The doctor explained that the area remained weak after the first surgery and any type of exertion, including coughing could cause a recurrence. Based on Dr. Thomas' evaluation, Mr. Davis asked the Insurer for permission to also see Dr. Nguyen. When he didn't receive a response, Mr. Davis traveled to Honolulu and waited a couple days while an unsuccessful attempt was made to have a surgeon look at the recurrent hernia.

[35]I take judicial notice that the 1999 federal *per diem* rate for Honolulu, Hawaii was $171 total, which included $110 for lodging. *See* http://www.dtic.mil/perdiem/pdrates.html.

[36]While some concern was raised about the absence of receipts to support Mr. Davis' reimbursement claim, the instructions also indicated that receipts were not necessary.

In the beginning of October 2000, Mr. Davis attempted to obtain approval from the Employer's insurer for another hernia operation. During Mr. Davis' October 11, 2000 clinic visit for a head cold and chronic cough, Dr. Paget observed a recurrence of an umbilical hernia and a "non-mesh" repair. According to Mr. Davis, the physician told him another hernia repair with mesh was necessary. Through November 2000, Mr. Davis unsuccessfully attempted to have the Insurer approve another surgery in Texas. The Insurer's representative expressed an intention to contact Dr. Nguyen and Dr. Thomas to discuss the case prior to making a decision on liability for medical treatment. Noting a surgeon, Dr. Paget, was available on Kwajalein, the Insurer's representative also specifically declined to accept responsibility for travel expenses. By the beginning of December 2000, while continuing to experience soreness in the navel area, and in the absence of a further response from the Insurer, Mr. Davis saw Dr. Nguyen for another operation. On December 14, 2000, Dr. Nguyen discharged Mr. Davis home from the Llano, Texas hospital with a pain medication and a six week restriction on heavy lifting.

Discussion[37]

Again, my inquiry on Mr. Davis' reimbursement claim starts with the necessity of his treatment. In determining this issue, I have scant medical evidence. The only direct evidence from a physician in evidence about the second hernia is Dr. Paget's diagnosis of a recurrent hernia. Mr. Davis did not provide the records from either Dr. Thomas or Dr. Nguyen about the second hernia. Instead, I am presented with Mr. Davis' recollection of their opinions. Such indirect evidence has diminished probative value. Had the Employer presented any contrary medical evidence on the issue, Mr. Davis' presentation would have fallen short in evidentiary terms. But, other than Ms. Diaz's stated concerns in her e-mail response, the Employer has not significantly challenged the necessity of the treatment. Ultimately, I conclude that based on Dr. Paget's diagnosis of a recurrent hernia in the area of the prior non-mesh repair, Mr. Davis' credible complaints of recurring pain in the navel area, and Dr. Nguyen's obvious decision to conduct a second hernia repair, I find Mr. Davis has presented sufficient circumstantial evidence that the procedure was necessary.

In regards to obtaining the Employer's prior permission for the second hernia operation, Mr. Davis had sought authorization for the procedure as early as October 2000. By mid-December 2000, the Employer's inaction in reaching a final decision on his request effectively denied further medical treatment for his recurrent hernia and permitted Mr. Davis to proceed without obtaining prior permission.[38] Consequently, I find the Employer is liable under Section

[37]Although the Employer did not directly challenge causation, I note that based on the nature of his work which included lifting objects up to 50 pounds, his coverage under the Defense Base Act, and the presence of a recurring hernia, Mr. Davis is able to establish through the un-rebutted Section 20 (a) presumption, that his recurrent hernia was work-related and thus a compensable injury.

[38]*See Rogers v. Pal Servs.,* 9 BRBS 807, 810-811 (1978) (By taking no action on an employee's request to be examined by a physician, the employer effectively refused or at least neglected to provide treatment or services within the meaning of the Act), and *Pirozzi v. Todd Shipyards, Corp.,*21 BRBS 294 (1988) (an employer's refusal to provide treatment or satisfy a claimant's request for treatment releases the claimant of the obligation of continuing to seek the employer's approval). In this situation, to hold the employer liable for medical expenses, a claimant need

7 of the Act for the medical costs associated with the second hernia repair operation in December 2000. In particular, I find the Employer must reimburse Mr. Davis for his hospital co-payment of $217 and physician co-payment of $294, for a total of $511.00.

Having determined that surgical treatment of Mr. Davis' recurrent hernia surgery was necessary, I must also address his request that I direct the Employer to reimburse his private health care provider, United Healthcare, for the medical costs the company paid for his procedure. Mr. Davis states his concern that his reliance on private health insurance for this operation potentially diminishes the future benefits he may receive due to the policy's ceilings on coverage.

In considering Mr. Davis' request, I am confronted with the obvious fact that United Healthcare did not intervene in this case. Usually, under Section 7, an employer need reimburse a claimant only for his own out-of-pocket expenses for necessary medical care and not for care paid by private non-occupational insurers. In these situations, the private non-occupational insurer must intervene in the proceedings to recover its payments. *Nooner v. National Steel & Shipbuilding Co.,* 19 BRBS 43 (1986). While the non-occupational insurer may intervene, a claimant is not entitled to assert the non-occupational insurer's rights for reimbursement for medical services it provided to the claimant, since the claimant has no standing. *Quintana v. Crescent Wharf Warehouse Co.,* 18 BRBS 254, 257-258 (1986) and 19 BRBS 52, 53 (1986) (Order on Reconsideration). Further, I consider Mr. Davis' asserted hypothetical loss of coverage for future medical expenses under the private insurer's policy insufficient to establish his standing to assert the insurer's claim. Accordingly, I conclude Mr. Davis' request for a mandate to the Employer to pay United Healthcare must be denied.

Turning to the reasonableness of selecting Dr. Nguyen in Llano, Texas, for the second surgery, Mr. Davis again presented his family support rationale. Mr. Davis also declined to consider surgery in Honolulu based on his perceptions that surgeons located in that city did not want to be involved in the repair of a recurrent hernia that had been initially treated by another surgeon. Further, he also noted that for the first hernia repair, the Insurer had approved and paid for treatment and some transportation off-island. Finally, he justified his choice of physician in part on the Insurer's failure to respond to his request for medical treatment in a timely manner.

I have already determined that Mr. Davis' understandable interest in having family members nearby after surgery does not render his selection of a surgeon thousands of miles away reasonable. Similarly, Mr. Davis' dismissal of any medical treatment in Honolulu based solely on the two day delay he experienced in July 2000, in which he did not actually see any doctor does not provide sufficient justification for excluding all surgeons on Oahu from consideration.

In regards to the purported similarities between the first operation and the second procedure, Mr. Davis makes a rational point; however, one significant distinction exists Dr. Lindborg specifically requested a medical referral for Mr. Davis' first hernia repair. As justification for that request, the physician indicated such medical care was not available on the atoll. Notably absent in the fall of 2000 for the second hernia operation is a similar medical

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only establish the treatment was necessary for a compensable injury. *Rieche v Tracor Marine,* 16 BRBS 272, 275 (1984).

referral request and justification. Although in October 2000 Dr. Paget diagnosed a recurrent hernia and told Mr. Davis another repair was warranted, the physician did not indicate such medical care was unavailable on the Kwajalein. In fact, the Insurer's representative raised the issue of whether appropriate medical care might be available on the island since Dr. Paget was a surgeon. Under these circumstances, Mr. Davis has failed to meet his burden of demonstrating the reasonableness of his choosing Dr. Nguyen in Llano, Texas, for the second hernia repair. Further, due to the absence of any medical determination by a physician on Kwajalein that medical treatment for the recurrent hernia was not available on the island, I find Mr. Davis has more fundamentally failed to demonstrate that his selection of any surgeon at some location other than Kwajalein was reasonable. Mr. Davis has not provided sufficient evidence to prove that he had to leave Kwajalein to obtain appropriate medical care for the recurrent hernia surgery.

Finally, based on the October, November, and December 2000 e-mail correspondence, Mr. Davis' frustration with the perceived delays in dealing with the Insurer's representative is apparent. That experience explains why he elected surgery for his recurrent hernia in December 2000 and justifies holding the Employer liable for the medical costs despite the absence of prior approval. However, the same circumstances do not also establish the reasonableness of his selection of Dr. Nguyen in Llano, Texas, especially in the absence of any medical justification in the record from the Kwajalein medical staff for surgery off-island.

Airfare. Mr. Davis claims $956.00 for a round trip ticket between Kwajalein and Honolulu. Based my finding that Mr. Davis did not prove that his choice of a surgeon located at some other location than the atoll was reasonable, his reimbursement claim is denied. I also note that the United States Air Force's Air Mobility Command provided the aircraft for his trip. Mr. Davis provided no evidence about the extent to which he had to pay for that government transportation. Additionally, for a portion of his trip, Mr. Davis was on temporary duty for the Employer. He did not provide any information on how that duty status may have affected his responsibility for the cost of his transportation during the trip.

Subsistence and Ground Transportation. For 20 of the total 36 days that he was away from Kwajalein, Mr. Davis seeks a daily subsistence payment of $95, for a total of $1,900. For the same 20 days he wants reimbursement for a rental car[39] at the rate of $36.25, totaling $725.00. Due to his failure to prove selection of medical treatment off Kwajalein was reasonable, these claims are denied.

Summary. Since the surgical repair of his recurrent hernia was necessary, I have approved Mr. Davis' medical costs of a co-payment reimbursement claim. At the same time, for the reasons noted above, his reimbursement request for incidental expenses in the amount of $3,581.00 is denied.

[39]Mr. Davis' travel order authorized a rental car. However, the order was published for personal travel and TDY and not medical leave. Additionally, Mr. Davis did not explain how his TDY status may have affected the rental car authorization.

C. First Left Knee Surgery

Background

On November 16, 1999, while playing soccer on Kwajalein, Mr. Davis experienced soreness in his left knee. Rest and pain medication resolved the problems. However, about a month later, while lifting and squatting to move heavy equipment, his knee started to hurt again. When the pain did not respond to rest and over-the-counter medication, Mr. Davis visited a doctor on February 10, 2000 and described his left knee problems. The physician did not find any gross defects but noted tenderness along the medial aspect of the left knee. He prescribed medication and a knee brace. About a week later, Mr. Davis returned and was evaluated by Dr. Paget. The left knee was not swollen very much and an x-ray was normal. The physician prescribed physical therapy. During the subsequent therapy, the therapist diagnosed a possible medial meniscus tear.

After the physical therapy sessions, on March 18 and March 22, 2000, Mr. Davis reported to Dr. Paget no improvement in the condition of his left knee. After finding no change or improvement, Dr. Paget recommended a transfer to Honolulu for an evaluation. On March 25, 2000, Dr. Thornhill approved the referral and eventually authorized eight days of medical leave.[40]

Mr. Davis traveled to Honolulu on April 4, 2000. He was initially evaluated by Dr. Davenport. However, due to time constraints, he was referred to Dr. Smith. After an examination, Dr. Smith diagnosed a medial meniscus tear and performed a partial medial meniscectomy and chondroplasty on April 6, 2000. Mr. Davis returned from Honolulu on April 11, 2000.

For the next two months, Mr. Davis received physical therapy on Kwajalein. He reported some improvement but continued pain. During a May 10, 2000 evaluation, Dr. Paget noted some improvement and reduced pain.

On June 21, 2000, Mr. Davis departed Kwajalein and did not return until July 25, 2000. During this trip, on June 22, 2000, Mr. Davis saw Dr. Smith in Honolulu. He reported some pain and a recent flare-up. On July 24, 2000, Dr. Smith again evaluated Mr. Davis, who reported he was doing better. Upon examination, Dr. Smith only observed mild pain. In the meantime, on June 28, 2000, Dr. Lindborg approved three days of medical leave for Mr. Davis' follow-up evaluation with Dr. Smith at the end of July 2000.

On October 15, 2000, Mr. Davis reported to a physical therapist that he was still experiencing pain in his left knee when flexing. On October 25, 2000, Dr. Elliott evaluated the condition of the left knee. The physician reported that surgery and physical therapy had greatly reduced the left knee pain and associated mechanical difficulties. However, Mr. Davis continued to have left knee pain. Dr. Elliott believed scar tissue might be causing the continued pain and

[40]On April 12, 2000, after Mr. Davis' return from Honolulu, Dr. Thornhill extended the original five days of medical leave to eight days.

suggested the possibility of another surgical evaluation if the problem persisted. Mr. Davis continued physical therapy into November 2000.

On November 17, 2000, Mr. Davis returned to Dr. Smith for a third follow-up evaluation. Mr. Davis reported continued pain along the medial aspect. Dr. Smith only found mild tenderness which he attributed to muscle atrophy.

On December 29, 2000,[41] Mr. Davis saw Dr. Robertson about his left knee. Mr. Davis was displeased with his treatment in Honolulu and sought another opinion from Dr. Robertson. Based on his examination and a December 11, 2000 MRI showing early degenerative changes and a deformed medial meniscus, Dr. Robertson believed Mr. Davis had either an additional meniscus tear or post-surgical changes. He prescribed an injection and additional medication.

Discussion

Mr. Davis has presented two reimbursement claims in regards to the first surgery on his left knee. In evaluating these claims, I will first briefly discuss the initial surgery and then turn to specific claims for his June/July 2000 follow-up trip to Dr. Smith and the December 2000 evaluation by Dr. Robertson.

Based on the parties' stipulation of fact, I find Mr. Davis suffered a work-related injury to his left knee on November 16, 1999. Since Mr. Davis suffered a compensable injury under the Act, he is entitled to reasonable and necessary medical treatment for the left knee. Through the initial surgery the Employer appears to have met its obligation to provide appropriate medical care. Specifically, when Mr. Davis' left knee did not improve after conservative treatment on Kwajalein, Dr. Paget recommended and Dr. Thornhill approved the medical referral to an orthopedic specialist on Oahu and eight days of medical leave. Based on the diagnosis of a medial meniscus repair, the Employer also approved arthroscopic surgery and correction by Dr. Smith.

According to Dr. Smith's treatment notes, he conducted three follow-up evaluations of Mr. Davis' left knee on June 22, 2000, July 24, 2000, and November 17, 2000. However, the record contains no evidence from Dr. Smith that he required all three visits. The only information indicating the necessity of any follow-on evaluation by Dr. Smith is Dr. Lindborg's approval of medical leave for the July 2000 appointment. Based on that medical referral, Mr. Davis has established that the July 2000 follow-up evaluation was a necessary treatment.

For this necessary follow-up appointment with Dr. Smith in July 2000, Mr. Davis seeks reimbursement of $956.00 for the round trip airfare, Kwajalein to Honolulu, with a starting date of June 21, 2000 and a return date of July 25, 2000. In evaluating this airfare claim, I first note the Mr. Davis' travel order indicates a combined purpose for the five week trip of vacation and TDY training. Because a portion of his itinerary included work-related training, an issue arises concerning the extent Mr. Davis was actually responsible for the cost of airfare from Kwajalein

[41] As discussed earlier, Mr. Davis arrived in San Antonio from Las Vegas on December 9, 2000 and underwent his second hernia repair in Llano, Texas. On December 20, 2000, he left San Antonio and flew back to Las Vegas. On December 27, 2000, he returned to San Antonio and departed for Las Vegas on December 30, 2000.

to Honolulu and return. Additionally, AMC provided the aircraft for the return trip. As I mentioned before, Mr. Davis has failed to provide any information concerning the personal expenses he actually incurred for travel while on TDY orders and whether he had to reimburse the costs associated with government-furnished transportation. Additionally, Dr. Lindborg's June 28, 2000 request concerning Dr. Smith's July 2000 appointment only authorizes medical leave for three days. The physician specifically stated the medical leave was being taken in conjunction with vacation travel. In other words, Dr. Lindborg approved the medical leave within the context that Mr. Davis would already have been on vacation travel. Consequently, unlike the initial referral and left knee surgery, medical authorities on Kwajalein did not conclude Dr. Smith's follow-up evaluation warranted official travel authorization. For these reasons, I conclude Mr. Davis has failed to establish his entitlement to the claimed $956 airfare and his reimbursement claim is denied.

In December 2000, after having Dr. Hogue look at his left knee, Mr. Davis saw Dr. Robertson for an evaluation. Based on the evidence before me, Mr. Davis appears to have scheduled and attended that examination on his own without prior authorization from the Employer. He now seeks the incidental expenses associated with Dr. Robertson's December 29, 2000 examination.

Under Section 7 (d) (1) of the Act, an employee is not entitled to recovery of medical expenses paid by him unless the employer has refused or neglected a request to furnish such services. In other words, the employer is not responsible for the payment of medical benefits if a claimant fails to obtain the requisite authorization. *Slattery Assocs. v. Lloyd,* 725 F.2d 780, 787 (D.C. Cir. 1984). However, failure to obtain authorization can be excused where the claimant has been effectively refused necessary medical treatment. *Id*.[42]

Mr. Davis explained that he sought additional medical treatment while in Texas because he was frustrated with his physician in Honolulu. At the same time, although Dr. Robertson believed the Employer had approved all his evaluations, Mr. Davis also acknowledged that he did not ask the Insurer's representative for permission to see another physician about his knee. Instead, after his personal physician saw his swollen left knee and had an MRI accomplished, Mr. Davis was referred to Dr. Robertson.

Absent in Mr. Davis' testimony is any valid excuse for failing to seek authorization for the December 2000 evaluation by Dr. Robertson. I recognize Dr. Robertson's examination arose shortly after Mr. Davis had experienced great difficulty in the fall of 2000 attempting to obtain authorization for a second hernia repair operation. By November 2000, Mr. Davis had become so frustrated with the process that he didn't even try to obtain approval for his November follow-up visit with Dr. Smith.[43] However, his difficulty in obtaining necessary treatment for his recurrent hernia does not excuse his failure to obtain prior authorization to see Dr. Robertson for another opinion about his left knee. Based on the latest reports form Dr. Elliott and Dr. Smith, the Employer may have been aware of Mr. Davis' continued pain and the possibility of further surgical intervention; yet, the treating orthopedic surgeon, Dr. Smith, did not share that concern.

[42]*See also* footnote 38.

[43]Mr. Davis has not submitted a reimbursement claim for this treatment.

In other words, the Employer was not really placed on notice that Mr. Davis believed he was receiving ineffective medical treatment for his left knee problems. Additionally, in the absence of any request, the Employer was not given an opportunity to find another knee specialist closer to Kwajalein than Texas. Due to the unexcused absence of prior authorization, I conclude the Employer is not responsible for the costs incurred by Mr. Davis for Dr. Robertson's December 29, 2000 examination and treatment.

Even if I had determined that Dr. Robertson's medical evaluation of December 29, 2000 was an authorized medical treatment, Mr. Davis still would have difficulty recouping most of his incidental expenses due to the reasonableness issue associated with Dr. Robertson's location in Texas. Again, while Mr. Davis had valid family connection and convenience concerns, I have previously concluded that he has failed to establish the reasonableness of traveling an additional 3,900 miles from Honolulu to receive medical care in southeast Texas. While treatment of his left knee certainly required more specialized care than his hernia operations, Mr. Davis nevertheless failed to establish that the absence of any qualified orthopedic specialist, other than Dr. Smith,[44] in Honolulu rendered as reasonable his additional travel to see Dr. Robertson in Texas.

In summary, for the reasons noted above, I conclude the Employer is not liable for the costs of Mr. Davis' December 29, 2000 evaluation and treatment with Dr. Robertson. As a result, his reimbursement request for $1,079.00 in airfare, subsistence, and rental car expenses must be denied.

C. Second Left Knee Surgery

Background

On February 2, 2001, Dr. Lindborg conducted a follow-up evaluation of Mr. Davis' left knee. The December 2000 injection had provided relief and Mr. Davis was feeling better. His personal physician had recommended injections or another operation. Dr. Lindborg found the left knee to be stable.

While working on Wake Island in February 2001, Mr. Davis aggravated his left knee due to extensive climbing up and down ladders to place heavy cameras on mounts. Due to swelling in his knee, he went to Dr. Corbett, who was stationed on the island. On February 15, 2001, Dr. Corbett noted medial joint line tenderness and diagnosed probable degenerative arthritis, aggravated by the physical demands of Mr. Davis' work.

About a week later, Mr. Davis traveled to Honolulu to see Dr. Smith. Due to Dr. Smith's unavailability, he went to Dr. Harpstrite on February 26, 2001. The doctor diagnosed degenerative medial joint disease. Rather than surgery, Dr. Harpstrite recommended medication and an un-loader brace. The Employer declined to provide the $2,600 device.

[44]Arguably, even Mr. Davis' criticism of Dr. Smith is objectively unreasonable. According to Mr. Davis, he believed Dr. Smith was not very thorough because he didn't order an MRI study prior to diagnosing a medial meniscus tear. Yet, Dr. Smith's judgment concerning the lack of necessity for a pre-diagnosis MRI was validated when he found a torn medial meniscus during surgery.

On March 3, 2001, Mr. Davis presented to Dr. Paget with renewed pain complaints after working on Wake Island. The Employer had denied the unloader brace and Mr. Davis was asking to return to Texas for another knee operation. Later in March 2001, Dr. Thornhill medicated Mr. Davis for continued left knee pain.

On March 20, 2001, Dr. Paget wrote Dr. Robertson asking him for a "prompt and complete evaluation" of Mr. Davis' left knee. He noted that Mr. Davis had suffered a re-aggravation recently and was not responding to medication or physical therapy. Due to the travel distances, Dr. Paget asked that physicians on Kwajalein be permitted to conduct any follow-on assessments.

When Mr. Davis arrived on March 28, 2001, Dr. Robertson found medial joint line pain and limited range of motion. Since Mr. Davis' symptoms were increasing, Dr. Robertson recommended surgery. Then next day, the Insurer's representative approved the procedure and Dr. Robertson operated on April 3, 2001. During the operation, Dr. Robertson accomplished a partial meniscectomy on an additional medial meniscus tear and a new lateral meniscus tear. Dr. Robertson monitored Mr. Davis' progress and released him to return to Kwajalein on April 8, 2001.

On April 12, 2001, Mr. Davis reported to physical therapy and he made good progress through June 2001.

On April 23, 2001, Dr. Robertson confirmed with the Insurer that Mr. Davis needed to return in June 2001 for a follow-up evaluation. The physician conducted the evaluation on June 4, 2001.

In mid-July 2001, Dr. Paget prescribed additional medication and concluded that Mr. Davis needed another follow-up appointment in Texas in December 2001.

On October 3, 2001, Mr. Davis returned to Dr. Robertson and reported improvement in his left knee. Dr. Robertson determined Mr. Davis had reached maximum medical improvement and rated him with a 22% impairment for the left lower extremity.

On October 19, 2001, Dr. Thornhill diagnosed residual left knee pain complaints.

On December 2, 2001, Mr. Davis received another knee injection. However, while TDY on an island on December 20, 2001, his left knee gave out, causing him to fall. Dr. Paget again recommended a knee brace.

In December 2001, Dr. Kienitz reviewed Mr. Davis' medical record and Dr. Robertson's impairment rating. Disagreeing with the 22% impairment, Dr. Kienitz also suggested Mr. Robertson's post-surgical difficulties were partially due to his weight and de-conditioning.

On July 31, 2002, Mr. Davis presented to Dr. Robertson with continued left knee pain. Dr. Robertson recommended a change in medication and increased leg muscle strengthening.

On October 30, 2002, Mr. Davis returned to Dr. Robertson. The physician noted some improvement with different medication. However, Mr. Davis continued to have left knee pain so the doctor suggested a series of injections.

In February and March 2003, on Kwajalein, Dr. Horner administered three injections to Mr. Davis' left knee.

In an April 28, 2003 evaluation, Dr. Robertson noted some improvement due to the injections. Dr. Robertson diagnosed osteoarthritis. A May 2003 MRI showed atrophy of the medial meniscus due to surgery.

Discussion[45]

Dr. Paget's March 20, 2001 referral letter and Dr. Robertson's March 28, 2001 evaluation establish that by March 2001, a second surgical intervention was warranted to address the continuing problems in Mr. Davis' left knee. By then, neither physical therapy nor medication had sufficiently resolved his left knee dysfunction. Additionally, the re-aggravation on Wake Island had intensified the left knee pain. Accordingly, I find the April 3, 2001 knee surgery was a necessary medical treatment and the Employer is responsible for its medical costs.

After his surgery, Mr. Davis returned to Dr. Robertson four times. The first two visits were clearly related to the April 2001 knee surgery. Shortly after the operation, Dr. Robertson confirmed with the Insurer the necessity of the June 4, 2001 visit and Dr. Paget agreed Mr. Davis needed to return to Dr. Robertson by December 2001; the actual visit occurred on October 3, 2001. Consequently, the Employer is liable for the medical costs associated with these two visits.

The other two visits with Dr. Robertson, July 31, 2002 and October 30, 2002, occurred after Dr. Robertson had determined Mr. Davis had reached maximum medical improvement ("MMI") in October 2001. Since Mr. Davis reached MMI in October 2001, the necessity of the last two visits is questionable. On the other hand, in his deposition, Dr. Robertson expressed his belief that the Insurer had approved all these visits with Mr. Davis. Additionally, though he reached MMI, Mr. Davis continued to experience left knee pain. The later two evaluations with Dr. Robertson helped him cope with the seemingly permanent condition. The finding of MMI only indicates Mr. Davis achieved the "maximum" benefit from medical treatments in regards to improvement in his left knee. The MMI determination did not preclude additional treatment to assist Mr. Davis in dealing with the continuing pain in his left knee. Due to the nature of Mr. Davis' left knee problems, I believe the July 31, 2002 and October 30, 2002 appointments involved necessary treatments. The Employer is liable for the associated medical expenses.

[45] Although the Employer did not directly challenge that the damage repaired in the second left knee surgery was work-related, I find Mr. Davis engaged in work activity in February 2001 on Wake Island that could have contributed to the further deterioration of the left knee discovered by Dr. Robertson during the second knee operation. As a result, Mr. Davis has invoked the Section 20 (a) causation presumption establishing that the knee damage he suffered after the first surgery was work-related. Dr. Kienitz' analysis did not really rebut the causation presumption based on work-related aggravation of a pre-existing condition or underlying disease. In other words, the surgical procedure on April 3, 2001 related to a compensable injury.

For his July 2002 visit with Dr. Robertson, Mr. Davis had to make a $40.20 co-payment. Since the visit was part of his necessary treatment, the Employer is responsible for reimbursement of the co-payment. Additionally, over the course of the treatment of his left knee, Dr. Paget and Dr. Robertson prescribed various medication. Mr. Davis paid a total of $120 in co-payments for four of the prescriptions. The Employer must reimburse Mr. Davis for his expenses related to that medication.

For both the April 3, 2001 left knee surgery and the four follow-up appointments, Mr. Davis has presented an impressive array of reimbursement claims for incidental expenses. To resolve these claims, I again return to the persistent theme of the reasonableness of Mr. Davis' choice of physician.

Once again, Mr. Davis presented the ease of recovery with family members as a justification for choosing Dr. Robertson for the second knee surgery in Texas. Likewise, once again, I find that rationale insufficient to render his choice of Dr. Robertson reasonable, especially considering that he apparently did not experience any complicated recovery problems after the first knee surgery in April 2000 that was done in Honolulu.

After re-aggravating his left knee on Wake Island in February 2001, Mr. Davis told Dr. Paget about his desire to return to Dr. Robertson in Texas for treatment. Dr. Paget supported that referral. Upon initial consideration, Dr. Paget's March 20, 2001 letter of support carries some weight on the merits of reasonableness. Yet, Dr. Paget's letter really only represents the physician's acceptance of Mr. Davis' choice of physician request. His recommendation doesn't mean Dr. Robertson was the sole surgeon capable of assisting Mr. Davis with his left knee problems.

Mr. Davis also explained he turned to Dr. Robertson because of his dissatisfaction with his care in Honolulu by Dr. Smith. Considering the sequencing of events, that argument has diminished value. Mr. Davis last saw Dr. Smith in July 2000 when he presented with only mild pain. Little objective evidence exists to support his dissatisfaction with Dr. Smith at that time. Even when he first saw Dr Robertson in December 2000, the physician only added the possibility of injections as another treatment modality; he did not recommend another surgery at that time. A second surgery arose as a suggested treatment only after Mr. Davis re-aggravated his left knee on Wake Island and was evaluated by Dr. Robertson.

Most significant, in the same manner as his choice of Dr. Nguyen for his hernia procedures, Mr. Davis has fundamentally failed to establish that adequate medical care for another knee surgery was not available in Honolulu. Absent that showing, he has not demonstrated that his selection of Dr. Robertson in Texas as the surgeon for the second knee surgery was reasonable. Consequently, the Employer is only responsible for incidental expenses that would have been incurred had the procedure, and follow-up evaluations, been accomplished in Hawaii, rather than Texas.

Airfare. Because Mr. Davis did not establish the reasonableness of traveling beyond Honolulu for additional surgery and treatment of his left knee, the following round trip airfare reimbursement claims are denied: March 2001, Honolulu to San Antonio ($873.17); June 2001,

Honolulu to Los Angeles ($469.30) and Las Vegas to San Antonio ($574.50); October 2001, Honolulu to Las Vegas ($419.80) and Las Vegas to San Antonio ($425.25); July 2002, Honolulu to San Antonio ($1,119.00); and, October 2002, Honolulu to San Antonio ($1,119.00).

For his return visit to Dr. Robertson in October 2001, Mr. Davis also claims the $871.60 cost of a round trip ticket from Kwajalein to Honolulu. At first glance, since orthopedic surgery would not have been available in Kwajalein and travel to Honolulu would have been required, this claim requires some further evaluation. Upon close examination, the validity of his claim becomes questionable. The stated purpose on his travel order for the September 26 to October 16, 2001 trip was vacation and temporary duty. Mr. Davis was directed to spend a couple of days in Burbank, California and White Sands, New Mexico on company business. Mr. Davis paid for his travel between Kwajalein and Honolulu and to El Paso, Texas, which is near White Sands,[46] with his American Express business credit card which carries the caption "Raytheon, Mr. Kenneth Davis." Mr. Davis provided no explanation in this case about how the travel costs were allocated between himself and the Employer when he traveled with combined purposes from Kwajalein to Honolulu. His use of a business credit card for that portion of his trip, coupled with TDYs in California and New Mexico, raises a significant question in my mind as to whether Mr. Davis actually bore the expense of his travel from the island to Hawaii. Consequently, I reject his reimbursement request for this particular round trip airfare.

Subsistence. Based on my previous findings, I will determine the appropriate number of subsistence days for Mr. Davis' second knee surgery and four follow-on appointments as though he received the medical care in Hawaii.

Mr. Davis seeks subsistence for 15 days of his 17 day trip between Kwajalein and San Antonio, Texas from March 24 through April 10, 2001. He arrived in Honolulu on March 23rd, spent two nights in Honolulu and did not arrive in San Antonio until March 25, 2001. He saw Dr. Robertson on March 28th, had knee surgery on April 3, and departed San Antonio on April 8, 2001. Based on these dates, I find Mr. Davis is entitled to subsistence for his second left knee surgery from March 28th through April 8th, plus a travel day on either side for a total of 14 days between March 27, 2001 and April 9, 2001. If those days had been taken in Honolulu, the federal *per diem* would have been $177[47] and the total subsistence would have been $2,478. Mr. Davis has claimed $1,451.46 in subsistence for 15 days plus the $597.97 ($429.02 + 168.95) cost of three nights lodging in Honolulu, for a total claim of $2,049.43. Since the subsistence for medical treatment in Honolulu would have exceeded the $2,049.43 actually claimed by Mr. Davis for this trip, I approve his subsistence and lodging reimbursement claim in the amount of $2,049.43.

On May 30, 2001, Mr. Davis departed Kwajalein and returned between June 12 and June 14, 2001. His travel order indicated dual purposes for the trip of medical and TDY. The

[46]I take judicial notice that the entrance to the White Sands Missile Range is approximately 60 miles from El Paso, Texas. RAND MCNALLY ROAD ATLAS 68 (2001).

[47]I take judicial notice that the federal *per diem* for Honolulu in 2001 was $177, which includes $112 for lodging. *See* http://www.dtic.mil/perdiem/pdrates.html.

business portion took him to Burbank, California. He was in San Antonio for one day, saw Dr. Robertson on June 4, 2001, claimed a day of subsistence expenses at $95, and (for unexplained reasons) also charged a room on Waikiki on March 29, 2001 at $155.97, for a total subsistence expense of $250.97. Because a medical visit in Honolulu would at most have taken one day from his TDY trip, I only approve a one day of subsistence expenses at $177.

On a trip from September 26, 2001 to October 16, 2001, Mr. Davis combined vacation, a medical appointment and TDY trips to California and New Mexico. Between September 29, 2001 and October 4, 2001, Mr. Davis was in San Antonio; during this period he saw Dr. Robertson on October 3, 2001. Mr. Davis seeks 7 days of subsistence at $95 a day for $665, plus three nights of hotel rooms in Waikiki costing $219.95, for total expenses of $956.95. Since Mr. Davis did not explain the circumstances of his six days in San Antonio, and he accomplished the office visit during a trip on which he was also on vacation and business, I believe Mr. Davis is entitled to no more than two days of subsistence. Had the surgical follow-up appointment been accomplished in Honolulu, I do not believe it would have delayed Mr. Davis from the rest of his vacation/TDY trip more than two days. As a result, I approve subsistence in the amount of $354, representing two days in Honolulu at the federal *per diem* rate of $177.

Mr. Davis saw Dr. Robertson again on July 31, 2002. On July 24, 2002, he left Honolulu for Las Vegas; he did not return to Hawaii until August 15, 2002. During that period, Mr. Davis was in San Antonio from July 29, 2002 to August 3, 2002; he saw Dr. Robertson on July 31, 2002. Mr. Davis seeks 6 days of subsistence for a total of $570. Based on this limited information, I conclude that Mr. Davis would have spent no more than two days in Honolulu to attend a follow-up examination of his left knee. Since the *per diem* rate at that time was $184,[48] I approve his reimbursement claim in the amount of $368.

Finally, Mr. Davis departed Kwajalein on October 2, 2002 and did not return until a month later on November 2, 2002. During this trip, Mr. Davis traveled to Las Vegas, Philadelphia, Jacksonville, and San Antonio. While in San Antonio from October 28, 2002 to October 31, 2002, he saw Dr. Robertson on October 30, 2002. Mr. Davis claims four days of subsistence for $380. For the reasons discussed above, I approve only two days of subsistence for $368.

Ground Transportation. For the initial April 2001 surgery and the first two follow-on treatments, Mr. Davis claims reimbursement for ground transportation in the form of a rental car. His total claimed expense is $762.59.[49] The travel orders for these three trips authorized a rental car. At the same time, all three trips also included a business purpose. In contrast, when Mr. Davis traveled under orders solely for medical treatment in August 1999, a rental car was specifically not authorized. Since Mr. Davis did not clarify the effect his TDY status may have had on the rental car authorization and he has not demonstrated the necessity for a rental car for his surgery and subsequent appointments, I will not approve his reimbursement request for the rental cars.

[48]I take judicial notice that the federal *per diem* for Honolulu in July and October of 2002 was $184, which includes $112 for lodging. *See* http://www.dtic.mil/perdiem/pdrates.html.

[49]$46.95 + 543.75 + 42.55 + 43.15 + 86.19.

Rather than a rental car, I will approve $50 for the airport ground transportation for each of the five trips, three $25 taxi trips for the April 3, 2001 surgery (March 28, 2001 evaluation, April 3, 2001 surgery, and one post-operation visit), and one $25 cab fare for each of the four appointments from July 2001 through October 2002. In total, I approve reimbursement of $425.00[50] for Mr. Davis' ground transportation during his treatment for the second surgery.

Issue No. 3 – Nature and Extent of Disability

A. Temporary Total Disability

Principles

Under the Act, a longshoreman's inability to work due to a work-related injury is addressed in terms of the nature of the disability (permanent or temporary) and extent of the disability (total or partial). In a claim for disability compensation, the claimant has the burden of proving, through the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding & Constr. Co*., 17 BRBS 56, 59 (1985).

The nature of a disability may be either temporary or permanent, and reflects an injury's potential for improvement through medical treatment. Although the consequences of a work-related injury may require long term medical treatment, an injured employee reaches maximum medical improvement when his condition has stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co*., 8 BRBS 857 (1978). In other words, the nature of the worker's injured condition becomes permanent and the worker has reached maximum medical improvement when the individual has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60. Any disability suffered by a claimant prior to MMI is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). If a claimant has any residual disability after reaching MMI, then the nature of the disability is permanent.

The question of the extent of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128, 131 (1991). The Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co*., 844 F.2d 797 (D.C. Cir. 1988). Total disability occurs if a claimant is not able to adequately return to his pre-injury, regular, full-time employment. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co*., 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant's physical injury and his inability to obtain work. The claimant must show an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity. Additionally, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the

[50]($50 x 5) + ($25 x3) + ($25 x 4)

entire resultant disability is compensable. *Strachen Shipping v. Nash*, 782 F.2d 531 (5th Cir. 1986).

First Hernia Repair

Mr. Davis claims total temporary disability compensation from September 11 to September 26, 1999. Previously, I have approved subsistence for only nine days from September 15, 1999 through September 24, 1999, as if the surgery had been conducted in Honolulu. Yet, regardless of whether Mr. Davis was in Texas, Honolulu, or Kwajalein, between the date of the operation, September 16, 1999 through September 27, 1999, Dr. Nguyen determined Mr. Davis was not physically able to return to work. Consequently, Mr. Davis was certainly temporarily and totally disabled from September 16 through September 27, 1999. Adding an additional day of unavailability due to travel for a procedure in Honolulu, I find Mr. Davis was unavailable to perform his usual and customary work due to his March 11, 1998 hernia injury from September 15, 1999 through September 27, 1999. During this period, Mr. Davis is entitled to temporary total disability compensation based on an a average weekly wage of $886.33.

Second Hernia Repair

Mr. Davis claims temporary total disability compensation for the entire duration of his trip from December 7, 2000 to January 9, 2001. Since the trip had three phases of personal leave in Las Vegas and the San Antonio area, medical treatment in Llano, Texas, and TDY, his claim is greatly exaggerated.

Because Mr. Davis did not establish that the second hernia repair could not be accomplished on Kwajalein, I did not approve any subsistence pay or travel for Mr. Davis in regards to this medical treatment. Nevertheless, regardless where the operation was conducted, Mr. Davis was obviously unable to return to his usual job for some period of time as a consequence of the second hernia surgery. Again, due to a dearth of information, in particular the absence of any information from Dr. Nguyen about the character of Mr. Davis' incapacitation, I only know that some time between December 9, 2000 when Mr. Davis arrived in San Antonio and December 14, 2000 when Dr. Nguyen released him to return home, he had a second operation on his hernia. Then, on December 20, 2000, Mr. Davis was able to return to Las Vegas. Based on these few facts, I conclude Mr. Davis was disabled from December 14 through December 19, 2000. Although this length of disability is shorter than the period associated with the first hernia operation, Mr. Davis failed to provide sufficient information to establish any longer period of disability. Accordingly, I find Mr. Davis is entitled to temporary total disability compensation from December 14 through December 19, 2000, based on an a average weekly wage of $886.33.

First Left Knee Surgery

In association with his first left knee surgery, Mr. Davis has requested disability compensation from April 4 through April 11, 2000 and December 27, 2000 through December 30, 2000. The Employer paid disability compensation for the first claimed period, although at a

lower average weekly wage. The Employer also paid Mr. Davis some disability compensation for two days in July 2000.

Based on the medical referral for his November 16, 1999 left knee injury recommended by Dr. Paget and approved by Dr. Thornhill, Mr. Davis departed Kwajalein on April 4, 2000 and was unable work as of that date. Since his subsequent evaluation, treatment, and post-operative recovery took another seven days, Mr. Davis did not return to Kwajalein until April 11, 2000. He returned to duty on April 12, 2000. As I have previously determined, the appropriate average weekly wage for any disability associated with Mr. Davis' November 16, 1999 left knee injury is $992.87. Accordingly, Mr. Davis is entitled to temporary total disability compensation from April 4, 2000 through April 11, 2000, based on an average weekly wage of $992.87.

Through Dr. Lindborg's medical leave approval, Mr. Davis has proven that his July 2000 medical appointment with Dr. Smith was a necessary treatment. The Employer paid two days of temporary total disability associated with this treatment. However, I note that on the day before and the day after the medical appointment, Mr. Davis was in personal leave status in Honolulu. As a result, at best, he is entitled to only one day of disability compensation. Accordingly, I find Mr. Davis should receive for July 25, 2000 one additional day of temporary total disability compensation due to his November 16, 1999 left knee injury.

Concerning Mr. Davis' visit to Dr. Robertson's on December 29, 2000, due to the unexcused absence of prior authorization, I have denied Mr. Davis' request for reimbursement of medical costs for that session. That determination does not necessarily deprive Mr. Davis of disability compensation for the days that he was unable to work associated with this visit. As part of his December 2000 evaluation, Dr. Robertson attempted to help Mr. Davis by administering an injection to his left knee. This treatment apparently provided temporary relief for about a month. Consequently, I believe Dr. Robertson provided necessary medical treatment on December 29, 2000. Since an orthopedic specialist was not available on Kwajalein, Mr. Davis would have had to travel to at least Honolulu for the initial orthopedic injection prescription that led to Dr. Robertson's treatment. During such a trip, Mr. Davis would have been unavailable for work on the two travel days to Honolulu and return to Kwajalein. Thus, Mr. Davis is entitled to one day of temporary total disability for the December 29, 2000 treatment and a day on either side of the appointment. I approve temporary total disability compensation for Mr. Davis from December 28 through December 30, 2000. The remaining day of disability, December 27, 2000, claimed by Mr. Davis is denied.

Second Left Knee Surgery

If Mr. Davis' second knee surgery had been accomplished in Honolulu, rather than in Texas, I have determined that he would have been absent from Kwajalein from March 27 through April 9, 2001. The record does not contain evidence of when Dr. Robinson indicated Mr. Davis could return to work. As a result, I will use March 27 through April 9, 2001 as the period of temporary total disability for Mr. Davis due to his second knee operation.[51]

[51]The Employer paid Mr. Davis temporary total disability for the entire period of his trip from March 24, 2001 through April 10, 2001. The length of compensation overcompensates Mr. Davis because his traveling an additional 3,900 miles to Texas for the second knee surgery was not warranted.

Mr. Davis claims four days of temporary total disability for his June 4, 2001 appointment with Dr. Robertson. However, in his subsistence claim, Mr. Davis sought no more than one day of subsistence and he was in San Antonio for no more than two days. These circumstances support a finding that had Mr. Davis been seen in Honolulu for a follow-up appointment, he would have been unavailable for work for no more than two days. Consequently, I approve temporary total disability compensation for June 3, and June 4, 2001.[52]

For essentially similar reasons, I believe Mr. Davis should receive two days of temporary total disability compensation for each of the remaining three medical appointments with Dr. Robertson on October 3, 2001, July 31, 2002, and October 30, 2002.[53] Specifically, Mr. Davis is entitled to temporary total disability compensation for October 2 and 3, 2001, July 30 and July 31, 2002, and October 29 and October 30, 2002.[54]

B. Permanent Partial Disability

On October 3, 2001, Dr. Robertson concluded that Mr. Davis had reached maximum medical improvement from the second left knee surgery. At that point, the nature of his disability related to the left knee injury became permanent. At the same time, because Mr. Davis continued to work, the extent of his disability is partial.

The method and amount of the actual compensation for a permanent partial disability is established by Section 8 (c) of the Act, 33 U.S.C. § 908 (c). In the first portion of this section, Sections 8 (c) (1) to (c) (17), compensation for numerous types of injuries, such as loss of a leg, is established by a specific schedule of awards. For other injuries not listed in this schedule, such as a back injury, Section 8 (c) (21) bases permanent partial disability compensation on two-thirds the difference between the average weekly wage of the employee and the employee's wage-earning capacity thereafter in the same or another employment.

Although the first 17 subparagraphs address the total loss of a specified limb, an eye or hearing, Section 8 (c) (19) provides that partial loss of use of a limb is compensated as a proportional loss of use of the limb. The Benefits Review Board and the courts apply the proportionality principle set out by Section 8 (c) (19) for a partial loss of use by indicating that compensation runs for the proportionate number of weeks attributable to the loss of the member at the full compensation rate of two-thirds of the average weekly wage. *Nash v. Strachan Shipping Co.*, 15 BRBS 386 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569 (5th Cir. 1985), *aff'd on recon en banc,* 782 F. 2d 513 (1986).

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[52]The Employer also paid Mr. Davis temporary total disability compensation for June 12 and June 13, 2001. I was not provided a reason for this compensation. However, I note that Mr. Davis' originally scheduled return of June 11, 2001 was apparently delayed for two days until June 13, 2001.

[53]Mr. Davis claimed five days of disability compensation for the October 3, 2001 appointment; four days for the July 31, 2002 exam; and five days for the October 30, 2002 evaluation.

[54]Because these office visits occurred during multi-purpose trips, I did not allow subsistence payments for any travel days. Similarly, since Mr. Davis was on vacation or business during his travel days, disability compensation for his travel is not appropriate.

For an injury listed on the schedule, the injured employee is automatically entitled to a certain level of compensation as a result of his injury and no proof of actual wage-earning capacity is required to receive the specified compensation. *See Travelers Ins. Co*., 225 F.2d 137 (2d Cir.) *cert. denied* 350 U.S. 913 (1955). As a result, the adjudication of a permanent partial disability under the schedule is based solely on physical factors. *Bachich v. Seatrain Terminals*, 9 BRBS 184, 187 (1978). In determining the appropriate degree (or proportionate) loss of use in a permanent disability compensation case, the Benefits Review Board in *Peterson v. Washington Metro. Area Transit Auth*. 13 BRBS 891, 897 (1981), stated an administrative law judge "is not bound by any particular formula when determining the degree of permanent partial disability and that it is within his discretion to assess a degree of disability different from the ratings found by the physicians if that degree is reasonable." A knee injury is adjudicated under Sections 8 (c) (2) and (c) (19) of the Act as partial loss of use of the leg. *Nash,* 15 BRBS at 391.

According to Dr. Robertson, the treating orthopedics surgeon, Mr. Davis has suffered a 9% whole person impairment due to his left knee condition, which yields a 22% impairment to his left lower extremity. Using the Fourth Edition of the AMA guidelines for the whole person impairment, Dr. Robertson attributed 3% due to the total loss of the medial meniscus. Although both knee surgeries only involved a partial, rather than total, meniscectomy, Dr Robertson explained that at the completion of the second procedure and in the smoothing of the medial meniscus, Mr. Davis effectively had lost the medial meniscus. Dr. Robertson next added a 1% whole person impairment for the partial repair of the lateral meniscus. Finally, based radiographic evidence and his internal evaluation of the left knee, Dr. Robertson completed the whole person impairment rating with another 5% for the arthritic condition of the left knee. Specifically, in an x-ray, he observed only a three millimeter gap in the knee, which warrants a disability impairment under the guidelines.

Although he used the Fifth Edition and considered different factors, Dr. Kienitz essentially reached the same impairment for the left knee in regards to the meniscus damage. The partial meniscectomies warrant a 10% impairment rating for the left knee. According to Dr. Kienitz, this is about the same rating under the Fourth Edition for the 4% whole person impairment Dr. Robertson found due to the meniscus damage. However, because Dr. Kienitz observed a five millimeter gap in the standing knee x-ray, he concluded no impairment for arthritis was necessary.

While the two doctors took different approaches for determining the impairment associated with the meniscus damage, they reached the same result, a 10% impairment. The principle dispute between these two medical practitioners, and the parties, is whether an additional rating is warranted for arthritis in the left knee.

In evaluating this conflict in medical opinion, I first assess the probative value of the medical opinions in terms of documentation and reasoning. A physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation such as radiographic tests and physical examinations. *Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985). A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Additionally,

to be considered well reasoned, the physician's conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

In light of these principles and for the following reasons, I conclude that Dr. Robertson has presented the more probative disability assessment. First, as Dr. Kienitz acknowledged, because Dr. Robertson actually operated on Mr. Davis' left knee, he was in the best position to observe the actual interior condition of the knee. This advantage has some value because Dr. Kienitz did not review the actual operative photographs. As a result, Dr. Robertson's diagnosis of osteoarthritis and opinion on the degree of impairment due to arthritis is better documented.

Second, although neither Dr. Robertson nor Dr. Kienitz are radiologists, Dr. Robertson is board certified in orthopedic medicine; Dr. Kienitz does not share that qualification. Consequently, I am inclined to give greater probative weight to Dr. Robertson's interpretation of the objective medical data, including the knee x-ray.

Third, Dr. Robertson's finding of a narrower three millimeter gap on the left knee x-ray is more consistent with other objective medical evidence in the record. Notably, during the first surgery on Mr. Davis' knee, Dr. Smith observed that Mr. Davis' knee was tight. A couple of years later, as she was providing injection therapy, Dr. Horner also commented that the medial joint line was narrow. Upon reviewing that treatment note, Dr. Kienitz agreed such a narrowing, if within AMA guidelines, might signify arthritic changes. Additionally, upon his initial evaluation of Mr. Davis in December 2000, Dr. Robertson noted MRI imaging consistent with degenerative arthritis in Mr. Davis' left knee.

Fourth, Dr. Kienitz did not necessarily dispute that other evidence might support a finding of arthritis. However, he based his finding of no impairment for arthritis strictly on the AMA guidelines which focused solely on the observable gap in the standing knee x-ray. In his opinion, because the knee x-ray showed a sufficient spacing of five millimeters, Mr. Davis was not entitled to an impairment rating for arthritis in his left knee. As noted in the principles discussed above, I am not bound to a rigid application of the Fifth Edition of the AMA guidelines. Such rigid application in Mr. Davis' case seems inappropriate, especially when the actual condition of his left knee has been directly observed by an orthopedic specialist during surgery. Upon consideration of all the objective medical evidence in the record, coupled with Dr. Robertson's expertise and better documented medical opinion, I conclude Dr. Robertson's additional impairment rating for an arthritic left knee is more consistent with all the evidence in the record and consequently more probative.

Accordingly, based on Dr. Robertson's more probative medical assessment on the extent of disability due to Mr. Davis' left knee, I find Mr. Davis has suffered a 22 % impairment to, and partial loss of use of, his left leg due to his November 16, 1999 left knee injury.

ATTORNEY FEE

Along with his closing brief, Mr. Streb submitted his attorney fee petition and supporting documents. He claims the expenditure of 69.2 hours of his professional time while the case was before the Office of Administrative Law Judges. Applying his $250 hourly rate, he seeks a fee

of $17,300. Another attorney provided additional support of 3.8 hours at $125 an hour, representing an additional professional fee of $475. Mr. Streb also seeks recoupment of $4,462.86 in litigation expenses.

Section 28 of the Act, 33. U.S.C. § 928, permits the recoupment of a claimant's attorney's fees and costs in the event of a "successful prosecution." Since I determined issues in favor of Mr. Davis, his attorney, Mr. Streb, is entitled to recoup his fees and the costs associated with his professional work. At the same time, because Mr. Davis was only partially successful, I will give Mr. Streb thirty days from the receipt of this Decision and Order to address the analysis set out by the U.S. Supreme Court, in *Hensley v. Eckerhart,* 461 U.S. 424 (1983), made applicable to longshoreman claims in *George Hyman Const. Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992).[55]

Counsel for the Employer, Mr. Gronau, has not yet responded to Mr. Streb's fee petition. Accordingly, he may respond to both the fee petition and the applicability of the *Hensley* considerations within forty-five days of his receipt of this Decision and Order.

ORDER

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The Employer, RAYTHEON RANGE SYSTEMS ENG., **SHALL FURNISH** to the Claimant, MR. KENNETH S. DAVIS, such reasonable, appropriate, and necessary **MEDICAL CARE AND TREATMENT** as the hernia injury that occurred on March 11, 1998, may require, including surgical repairs on September 16, 1999 and in mid-December 2000, and a $511.00 reimbursement of medical co-payments related to the second operation, in accordance with Section 7 (a) of the Act, 33 U.S.C. § 907 (a).

2. The Employer, RAYTHEON RANGE SYSTEMS ENG., **SHALL REIMBURSE** the Claimant, MR. KENNETH S. DAVIS, a total of $1,342.00 for incidental expenses associated with the September 16, 1999 hernia repair operation that arose due to a hernia injury that occurred on March 11, 1998, in accordance with Section 7 (a) of the Act, 33 U.S.C. § 907 (a).

3. The remaining portion of the reimbursement claim by MR. KENNETH S. DAVIS for incidental expenses associated with the September 16, 1999 hernia repair operation is **DENIED**.

4 The request by the Claimant, MR. KENNETH S. DAVIS, to direct the employer, RAYTHEON RANGE SYSTEMS ENG., to reimburse his private non-occupational

[55]As a starting point, Mr. Davis clearly prevailed on the extent of permanent partial disability and the application of higher average weekly wages to the disability compensation. On the other hand, Mr. Davis claimed approximately $19,500 in incidental expenses and 100 days of temporary total disability. I have approved reimbursement of about $5,600 in incidental expenses and 56 days of temporary total disability compensation.

health insurer, UNITED HEALTHCARE, for its payments of medical costs associated with his mid-December 2000 recurrent hernia repair operation due to a hernia injury that occurred on March 11, 1998 is **DENIED**.

5. The reimbursement claim by MR. KENNETH S. DAVIS for incidental expenses associated with the mid-December 2000 recurrent hernia repair operation is **DENIED**.

6 The Employer, RAYTHEON RANGE SYSTEMS ENG., **SHALL PAY** the Claimant, MR. KENNETH S. DAVIS, compensation for **TEMPORARY, TOTAL DISABILITY**, from September 15 through September 27, 1999, and from December 14 through December 19, 2000, based on an average weekly wage of $886.33, for a hernia injury that occurred on March 11, 1998, in accordance with Section 8 (b) of the Act, 33 U.S.C. § 908 (b).

7. The Employer, RAYTHEON RANGE SYSTEMS ENG., **SHALL FURNISH** to the Claimant, MR. KENNETH S. DAVIS, such reasonable, appropriate, and necessary **MEDICAL CARE AND TREATMENT** as the left knee injury that occurred on November 16, 1999, may require, including surgical procedures on April 6, 2000 and on April 3, 2001, office visits on June 4, 2001, October 3, 2001, July 13, 2002, and October 30, 2002, a $40.20 reimbursement of a medical co-payment, and a $120.00 reimbursement for medication, in accordance with Section 7 (a) of the Act, 33 U.S.C. § 907 (a).

8. The reimbursement claims by MR. KENNETH S. DAVIS for the cost of airfare in June and July 2000, March 2001, June 2001, October 2001, July 2002, and October 2002 are **DENIED**.

9. The reimbursement claim by MR. KENNETH S. DAVIS for incidental expenses associated with a December 29, 2000 medical evaluation by Dr. Robertson is **DENIED**.

10. The Employer, RAYTHEON RANGE SYSTEMS ENG., **SHALL REIMBURSE** the Claimant, MR. KENNETH S. DAVIS, a total of $3,741.43 for the following incidental expenses: $425 in ground transportation; $2,049.43, associated with the April 3, 2001 surgery; $177.00, associated with the June 4, 2001 medical treatment; $354.00, associated with the October 3, 2001 medical treatment; $368.00, associated with the July 31, 2002 medical treatment; and, $368.00, associated with the October 31, 2002 medical treatment, that arose due to a left knee injury that occurred on November 16, 1999, in accordance with Section 7 (a) of the Act, 33 U.S.C. § 907 (a).

11. The remaining portions of the reimbursement claims by MR. KENNETH S. DAVIS for incidental expenses associated with medical treatments on June 4, 2001, October 3, 2001, July 31, 2002, and October 30, 2002 are **DENIED**.

12. The Employer, RAYTHEON RANGE SYSTEMS ENG., **SHALL PAY** the Claimant, MR. KENNETH S. DAVIS, compensation for **TEMPORARY, TOTAL DISABILITY**, from April 4 through April 11, 2000, July 25, 2000, from December 28

through December 30, 2000, from March 27 through April 9, 2001, June 3 and June 4, 2001, October 2 and October 3, 2001, July 30 and July 31, 2002, and October 29 and October 30, 2002, based on an average weekly wage of $992.87, for a left knee injury that occurred on November 16, 1999, in accordance with Section 8 (b) of the Act, 33 U.S.C. § 908 (b).

13. The **TEMPORARY TOTAL DISABILTY** compensation claim of the Claimant, MR. KENNETH S. DAVIS, for December 27, 2000 is **DENIED**.

14. The Employer, RAYTHEON RANGE SYSTEMS, ENG., **SHALL PAY** the Claimant, MR. KENNETH S. DAVIS, compensation for **PERMANENT PARTIAL DISABILITY** due to a permanent 22% loss of use of his left leg caused by a left knee injury on November 16, 1999, based on an average weekly wage of $992.87, in accordance with Section 8(c) (2) and Section 8(c) (19) of the Act, 33 U.S.C. §§ 908 (c) (2) and 980 (c) (19).

15. The Employer, RAYTHEON RANGE SYSTEMS ENG., **SHALL RECEIVE CREDIT** for all amounts of medical benefits previously provided to the Claimant, MR. KENNETH S. DAVIS, as a result of his injuries on March 11, 1998 and November 16, 1999.

16. The Employer, RAYTHEON RANGE SYSTEMS ENG., **SHALL RECEIVE CREDIT** for all amounts of disability compensation previously paid to the Claimant, MR. KENNETH S. DAVIS, as a result of his hernia injury on March 11, 1998 and left knee injury on November 16, 1999.

SO ORDERED:

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RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: September 10, 2004
Washington, DC